163-273

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 180.

CELESTINE PIM, PLAINTIFF IN ERROR,

vs.

THE CITY OF ST. LOUIS AND THE ST. LOUIS SOUTHERN DOCK COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 12, 1894.

(16,705.)

(15,705.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 180.

CELESTINE PIM, PLAINTIFF IN ERROR,

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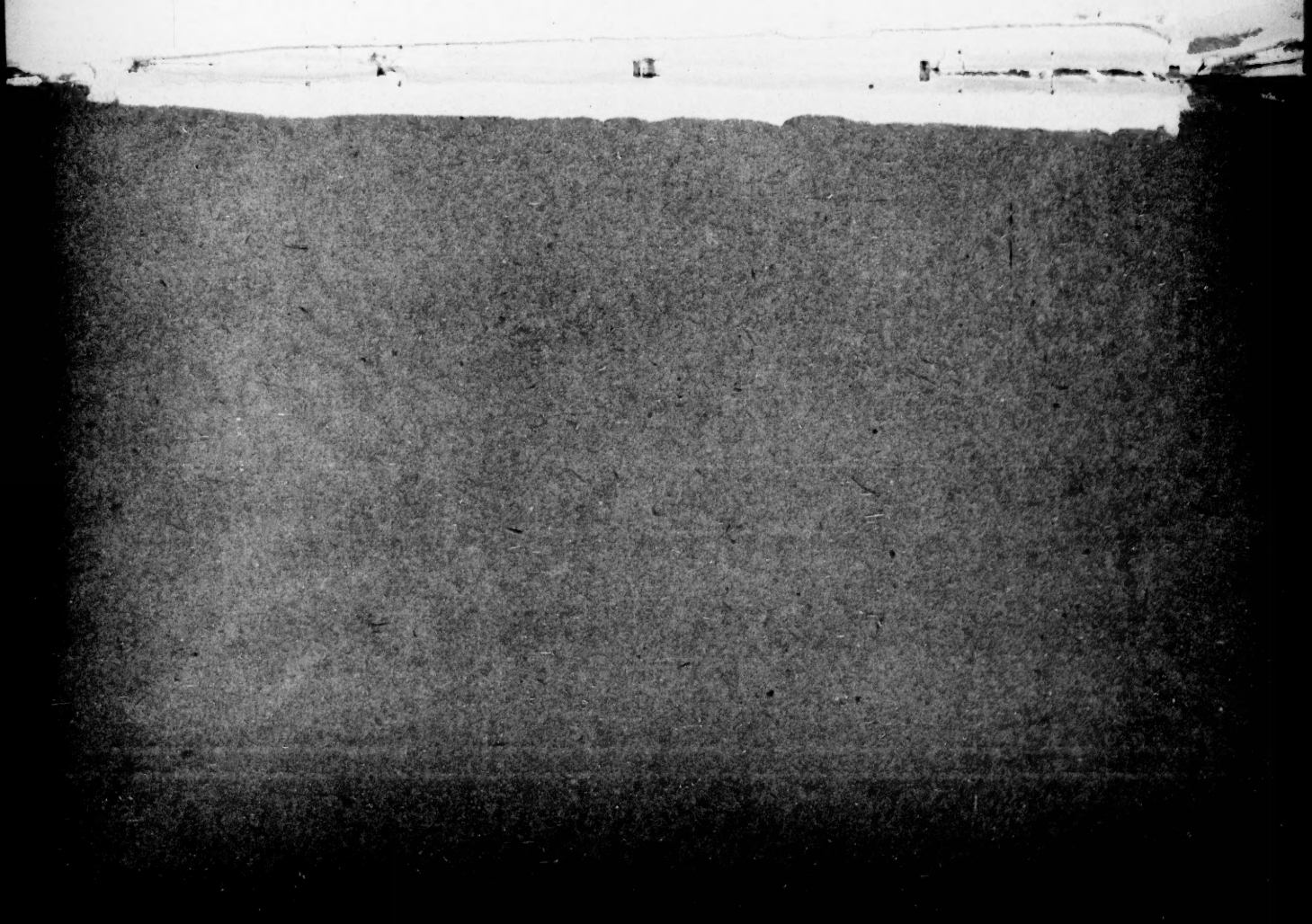

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1 The President of the United States to the honorable the judges of the division number two of the supreme court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the April term, 1894, thereof, between Celestine Pim, plaintiff in error, and The City of St. Louis and The St. Louis Sectional Dock Company, defendants in error, a manifest error hath happened, to the great damage of the said Celestine Pim, plaintiff in error as aforesaid, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington, D. C., on the third day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of the United States Circuit Court for the Western District Missouri, Central Division.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—

JAS. B. GANTT,
Presiding Judge, Division Number Two, Supreme Court of Missouri.

1½ [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. Celestine Pim, plaintiff in error, *vs.* The City of St. Louis and St. Louis Sectional Dock Co., defendants in error. Writ of error to the supreme court of the State of Missouri, division number two. Returned and filed 15th day of September, 1894. Jno. R. Green, clerk.

Return to Writ.

STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 21st day of September, A. D. 1894.

JNO. R. GREEN, *Clerk.*

2 THE UNITED STATES OF AMERICA:

To the City of St. Louis and the St. Louis Sectional Dock Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the third day of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Celestine Pim is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, presiding judge of division number two of the supreme court of the State of Missouri, this fourth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

JAS. B. GANTT,
Presiding Judge.

2½ [Endorsed:] Supreme court of Missouri. Celestine Pim, plaintiff in error, *vs.* The City of St. Louis and The St. Louis Sectional Dock Co., defendants in error. Citation. Filed September 15th, 1894. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 10th day of Sept., A. D. 1894.

W. C. MARSHALL,
Attorney for Defendants in Error.

3 CELESTINE PIM, Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK CO., Defendants in Error.

Assignment of Errors.

The undersigned, attorneys for the plaintiff in error in said case, respectfully represent that in the above-entitled cause, wherein the said supreme court of the State of Missouri gave judgment for the aforesaid defendants, the said court committed errors in this:

1. That said court erroneously deprived plaintiff by its judgment of her property without due process of law and contrary to the fourteenth amendment of the Constitution of the United States.

2. That said court erroneously held and decided as to an estate in fee in remainder in certain real premises herein sued for, which devolved on the plaintiff in the year 1869 on the happening of the death of the owner of the life estate in said premises, that the same was barred by ten years' adverse possession, commencing in 1858, during the lifetime of the grantor of said estates for life and in remainder and prior to his death, which occurred in 1860, and which period of ten years terminated in 1868, during the existence of the life estate and prior to the time when the estate in fee in re-
4 mainder vested in plaintiff.

3. That said court erroneously held and decided that a statute — limitations of the State of Missouri took effect so as to bar plaintiff's cause of action by an adverse possession of ten years, during which period the plaintiff was disabled from maintaining an action to recover the premises in controversy by the fact that she was not entitled to the possession of said premises during the life of the owner of the life estate therein.

4. That said court erroneously gave judgment in said case for the defendants, whereas judgment should have been given for the plaintiff.

LEVERETT BELL,
GEORGE J. DAVIS AND
HENRY B. DAVIS,
Attorneys for Pl'ff in Error.

5 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 18th day of March, 1893, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript wherein Celestine Pim was appellant and The City of St. Louis and The St. Louis Sectional Dock Company were respondents; which said transcript is in words and figures as follows, viz:

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on the 15th day of January, A. D. 1892, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition in a certain cause wherein Celestine Pim is plaintiff and The City of St. Louis *et al.* are defendants.

The said petition is in words and figures as follows, to wit:

Petition.

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court of the City of St. Louis.

CELESTINE PIM, Plaintiff,
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY, Defendants.

The plaintiff states that the defendants are and were at the
6 times hereinafter mentioned corporations duly created by law, and that on the first day of July, A. D. 1888, the plaintiff was the owner and entitled to the possession of an undivided one-half interest in the following-described premises, in the city of St. Louis and State of Missouri, to wit, a lot of land in front of block 868 of the city of St. Louis and between it and the Mississippi river, bounded east by said river, west by the east line of block 868, south by the north line of Trudeau street produced to the river, and north by the south line of Russell avenue produced to the river, and having a width from east to west of about 300 feet and a length from north to south of about 346 feet and 6 inches, and that being so entitled to the possession thereof that the defendants afterwards and on the following day entered into said premises and unlawfully withhold from plaintiff the possession thereof, to her damage in the sum of 10,000 dollars. Plaintiff states that the monthly value of the rents and profits of the premises is 300 dollars. Plaintiff asks judgment for the recovery of her undivided one-half interest in said premises, with damages, monthly rents and profits, and interest and costs, and for such other relief as she may be entitled to.

LEVERETT BELL AND
GEO. J. AND HENRY B. DAVIS,
Plaintiff's Attorney-.

Upon the filing of the said petition a summons for the defendants was issued from the office of the said clerk and delivered to the sheriff of the city of St. Louis, and was thereafter returned by the said sheriff, executed as to each defendant; and afterwards,
at the February term, 1892, of the said court, the following
7 proceedings were had in said cause, to wit:

Separate Answer of City of St. Louis Filed.

CELESTINE PIM
vs.
THE CITY OF ST. LOUIS *et al.* } (87443.)

WEDNESDAY, *February 3rd*, 1892.

Separate answer of the City of St. Louis filed; which answer is in words and figures as follows, to wit:

Separate Answer of City of St. Louis.

In the Circuit Court, February Term, 1892.

CELESTINE PIM, Plaintiff,
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY, Defendants.

Now comes the City of St. Louis and for its separate answer herein denies each and every allegation in plaintiff's petition contained.

Further answering, defendant says that it has been in possession of the property described in plaintiff's petition since, to wit, 1868, and has held, occupied, and enjoyed the same continuously adversely and claiming title to the same against the world.

Further answering, defendant says that plaintiff did not commence her said action to recover possession of said property within ten years after her alleged cause of action accrued.

Wherefore, having fully answered, defendant asks to be hence dismissed with its costs.

WM. C. MARSHALL,
Att'y for City of St. Louis.

8 And afterwards, at the same term of said court, the following further proceedings *was* had in said cause, to wit:

Reply Filed; Default as to St. L. Sectional Dock Co.

CELESTINE PIM
vs.
CITY OF ST. LOUIS *et al.* } (87443.) Reply Filed.

THURSDAY, *February 4th*, 1892.

The plaintiff comes, by attorney, but the defendant The St. Louis Sectional Dock Company, although being duly summoned and called, comes not, but makes default. Wherefore, on motion of said plaintiff, it is ordered that the petition herein be taken against it as confessed, and that an inquiry be had.

Which reply is in words and figures as follows:

Reply.

St. Louis Circuit Court.

PIM
vs.
CITY OF ST. LOUIS.

The plaintiff, for a reply to the answer of the City of St. Louis herein, denies each and every allegation contained in said answer and prays judgment as in the petition.

LEVERETT BELL AND
GEO. J. AND H. B. DAVIS,
Pl'ff's Att'ys.

And afterwards, at the April term, 1892, of said court, the following further proceedings were had in said cause, to wit:

Jury Empaneled; Trial Progressed.

9 CELESTINE PIM
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY. (87443.)

MONDAY, *April 25th*, 1892.

Now, at this day, this cause coming on for hearing, the plaintiff and the defendant The City of St. Louis come by their respective attorneys, but the defendant The St. Louis Sectional Dock Company, being still in default, comes not; thereupon comes a jury, to wit, Geo. M. Bartlett, Peter Best, Isaac W. Clark, Louis A. Engle, Walter Ennes, R. J. Fineron, John H. McKinsey, Ernest Malter, John H. Schultz, August Strathmann, Joseph Curry, and Frank H. Knight, twelve good and lawful men, who, being duly elected, tried, and sworn the issues herein joined well and truly to try and a true verdict render according to the law and the evidence, the trial of this cause progressed, but, not being finished at the hour of adjournment, the further trial is postponed until tomorrow.

Trial Progressed.

CELESTINE PIM
vs.
THE CITY OF ST. LOUIS *et al.* (87443.)

TUESDAY, *April 26th*, 1892.

Now again the parties and jurors aforesaid come, and thereupon the trial of this cause progressed, but, not being finished at the hour of adjournment, the further trial is postponed until tc morrow.

Trial Progressed.

10 CELESTINE PIM
vs.
CITY OF ST. LOUIS *et al.* } (87443.)

WEDNESDAY, *April 27th*, 1892.

Now again come the parties and jurors as aforesaid, and thereupon the trial of this cause progressed, but, not being finished, the further trial is postponed until tomorrow.

Verdict.

CELESTINE PIM
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY. } (87443.)

THURSDAY, *April* 28, 1892.

Now again come the parties and jurors aforesaid, and thereupon the trial of this cause progressed, and, being finished, the jurors aforesaid upon their oaths aforesaid say they find for the defendant-. Verdict and instruction filed.

Motion for New Trial Filed.

CELESTINE PIM
vs.
CITY OF ST. LOUIS *et al.* } (87443.)

FRIDAY, *April 29th*, 1892.

Motion for new trial filed.

And afterwards, at the June term, 1892, of said court, the following further proceedings were had in said cause, to wit:

Motion for New Trial Overruled.

CELESTINE PIM
vs.
11 CITY OF ST. LOUIS *et al.* } (87443.)

MONDAY, *July* 18, 1892.

It is ordered by the court that the motion heretofore filed herein for a new trial be overruled.

Judgment.

CELESTINE PIM
vs.
CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY. } (87443.)

MONDAY, *July* 18, 1892.

The motion for a new trial of this cause having this day been overruled, the court doth now proceed to render judgment on the verdict of the jury heretofore, on April 28, 1893, returned into court in favor of the defendant. It is therefore considered by the court that the plaintiff take nothing by its suit in this behalf, but that the defendant go hence without day and recover of the plaintiff its costs and charges herein expended, and that execution issue therefor.

10 *Days' Additional Time Given Defendants to File Objections to Plaintiff's Bill of Exceptions.*

CELESTINE PIM
vs.
CITY OF ST. LOUIS *et al.* } (87443.)

MONDAY, *August 1st*, 1892.

On motion of defendants, by attorney, ten days' additional time is given them to file objections to the plaintiff's bill of exceptions in this cause.

Bill of Exceptions Filed, Affidavit for Appeal Filed and Allowed to Supreme Court.

12 WEDNESDAY, *Sept. 28th*, 1892.

Now, at this day, the plaintiff comes, by attorney, and presents to the court her bill of exceptions, which is allowed, signed, sealed, and filed and made a part of the record herein. She also files an affidavit for appeal, and on her motion an appeal is allowed her to the Supreme Court from the judgment herein rendered.

Which bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

CELESTINE PIM, Plaintiff,
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY, Defendants. } St. Louis Circuit Court.

Be it remembered that this cause came on for trial in court-room 5 before the Hon. L. B. Valliant, one of the judges of said court, and a jury on April 26, 1892, and the following proceedings were

had. The plaintiff introduced evidence tending to show the following state of facts:

The plaintiff claims under Joseph Brazeau, to whom, on November 20, 1786, a concession was made by Francis Cruzat, lieutenant governor of Upper Louisiana, of a tract of ground on the west bank of the Mississippi river of ten arpens from north to south, and bounded west by the main road leading to Carondelet. This concession was augmented by a second concession made by Carlos Dehault Delassus, lieutenant governor, etc., on November 19, 1799, to Brazeau on the petition of the latter of a tract of land, including the foregoing concession and in augmentation of it, of twelve
13 arpens in front by thirty arpens in depth from the Mississippi river, with directions to Soulard, surveyor of Upper Louisiana, to survey and plat both of said concessions and deliver the same to said Brazeau. The survey and plat of said concessions for said Brazeau were executed by Mackey, deputy surveyor, May 28, 1803, and approved by Soulard, surveyor general, August 21, 1803, and said survey and plat bounded the land on the east by the Mississippi river. The board of commissioners for adjusting titles to lands in Missouri began their action on this claim of 360 arpens on July 19, 1806, when it was ascertained that it conflicted with the common —, and no decision was made. Further action was had August 19, 1811, when it was rejected. On March 14, 1833, it was before the board and evidence in regard to it was taken, and on November 11, 1833, it was confirmed to Brazeau or his legal representatives, according to the concessions, and was reported by the commissioners to the Commissioner of the General Land Office and by him reported to Congress and confirmed by an act of Congress approved July 14, 1836, entitled "An act confirming claims to land in the State of Missouri, and for other purposes."

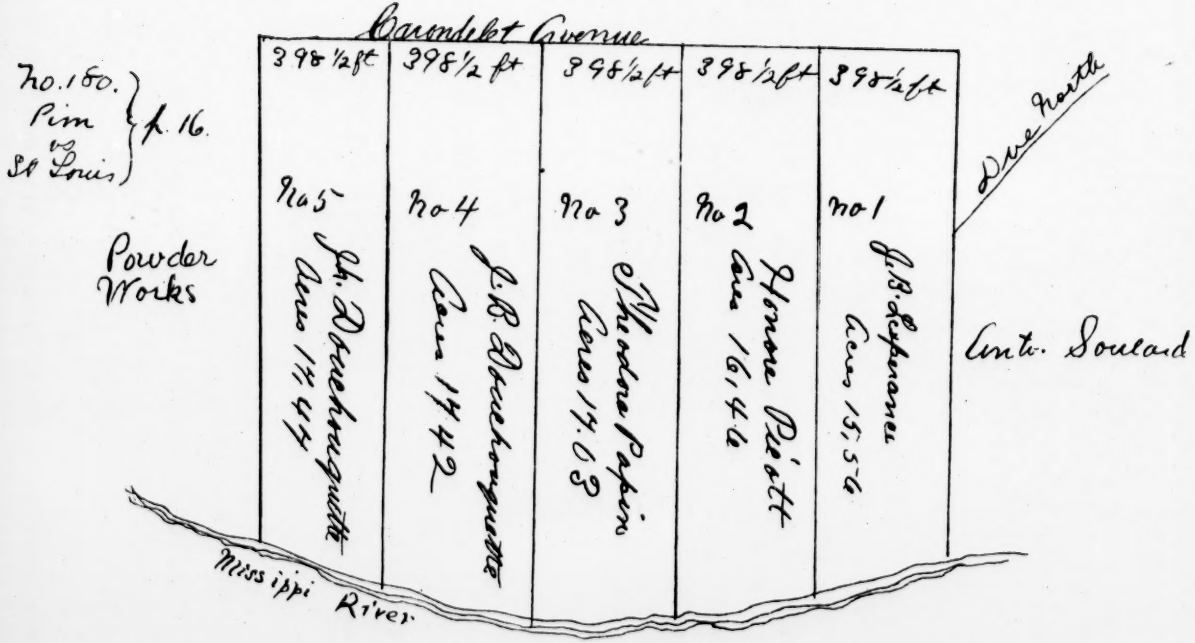
The above proceedings relating to the concessions and confirmation of the Brazeau tract appear in volume 5, American State Papers, page 798, decision 84. The act of Congress of July 4, 1836, is printed in 5 U. S. S. at *at* Large, page 126. Said act may be considered a part of the record herein, and by consent either party may refer to the same as fully as if copied in full herein.

LEVERETT BELL,
Att'y for Plaintiff.
W. C. MARSHAL,
Att'y for Def't.

14 Immediately south of the above ground and adjoining the south line Brazeau acquired from Benito Vasquez by deed of May 26, 1800, a strip of two arpens in front on the Mississippi river, running back to the Carondelet road. The concession to Vasquez was made by Cruzart November 20, 1876, and was presented to the board of commissioners by Brazeau, assignee of Vasquez, and confirmed to Vasquez or his legal representatives and reported to Congress. 5 American State Papers, page 675, decision 52. It was confirmed by the above act of Congress of July 4, 1836.

United States surveys 298, 332, 3078, and 3185 were given in

evidence by the plaintiff. Survey 298 was executed in April, 1818, and exhibits the Brazeau tract fronting on the river and containing $85\frac{7}{100}$ acres. Survey 332 was executed in April, 1818, and represents the two arpens in front on the river acquired by Brazeau of Vasquez, as stated aforesaid. Survey 3078 was executed in February, 1837, and includes surveys 298 and 332 and exhibits the entire front of Brazeau on the Mississippi river. Survey 3185 was executed May 24, 1838, and is a survey of the ground on the river originally conceded by Cruzat to Vasquez on November 20, 1876, above spoken of. In all of the above surveys the ground is bounded on the east by the Mississippi river, and there is no reference to an island in the river nor any indication of one on the plats. The death of Joseph Brazeau occurred November 22, 1816, and his will, dated May 5, 1798, was probated November 26, 1816, in the circuit court within and for the county of St. Louis, in the Territory of Missouri, and recorded in the office of recorder of deeds of St. Louis county on April 12, 1836. By this instru-
15 ment, after certain bequests of personal property, the estate was devised to Marie Theresa Beazeau, his wife, for life, and after her death to Marie Brazeau, his niece, in fee. Subsequent to the date of the will and in 1878 Marie Brazeau, the niece aforesaid, married Jean Baptiste Duchouquette. There was a marriage contract between them, dated July 2, 1798, and recorded in the recorder's office of St. Louis county April 12, 1836, by which all property was to be held in common between them. By deed of February 14, 1817, acknowledged and recorded on the same day, the widow of Joseph Brazeau, deceased, conveyed to Jean Baptiste Duchouquette and Marie, his wife, all her right and interest in the property devised to her as aforesaid. Marie Theresa Brazeau, widow of Joseph Brazeau, died February 3, 1834. Marie Brazeau Duchouquette, niece of Joseph Brazeau, died July 8, 1818. Jean Baptiste Douchouquette died 1834, prior to May 5. Jean B. Douchouquette and Marie, his wife, had six children, three sons and three daughters, all of whom survived their parents, namely: 1, John B. Douchouquette; 2, Louis Douchouquette, who died about October, 1834, without issue and intestate; 3, Joseph Douchouquette; 4, Melanie Douchouquette, who married Theodore Papin and died on November, 1834, leaving her husband and four children surviving her; 5, Therese Duchouquette, who married Honore Picotte and died in 1869; 6, Elizabeth Duchouquette, who married J. B. Lesperance and died leaving one son. Partition proceedings were begun on December 3, 1834, in the circuit court of St. Louis county between John B. Duchouquette, Jr., and others, comprising the living children of Baptiste and Marie Duchouquette and the children of Mrs. Papin, who was dead, which
16 resulted in the sale of the premises therein described, among others said concessions, which said sale was confirmed by the court at the March term, 1835, and a commissioners' deed, dated March 25, 1836, was executed to Theodore Papin, a purchaser at said sale, for a tract of land described in said deed and in the partition proceedings as follows: "That certain tract of land situated in


Carondelet Avenue
398 1/2 ft
398 1/2 ft
398 1/2 ft
398 1/2 ft
398 1/2 ft
No. 160. Pine St Louis
f. 16.
No 5
Ch. Deschamps Aces 1 1/2 47
No 4
L.B. Deschamps Aces 1 1/2 42
No 3
Theodore Papin Aces 1 1/2 03
No 2
Honore Piatt Aces 16, 4 6
No 1
J.B. Lefranc Aces 15, 5 6
Powder Works
Miss ippi River
Cente Soulard

the county of St. Louis, containing eighty-three acres and ninety-four hundredths of an acre, and bounded eastwardly by the Mississippi river, northward by land of the late Antonie Soulard, deceased; westward by the road leading from St. Louis to Carondelet, and southwardly by land originally granted to Berrito Vasquez." By deed of Theodore Papin to Honore Picotte, dated June 1, 1835, acknowledged November 23, 1835, and recorded November 7, 1835, a part of said tract was conveyed, being lot 2 as designated on the plat attached to said deed and fronting on the Mississippi river, containing sixteen and forty-six hundredths acres. The plat attached to the deed is as follows:

(Here follows plat marked p. 16.)

It was shown at the trial by the oral testimony of Mr.
17 Oscar Dziatzko, the surveyor.

Testimony of OSCAR DZIATZKO, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by LEVERETT BELL, Esq.:

Q. What is your name?
A. Oscar Dziatzko.
Q. What is your business?
A. Civil engineer.
Q. How long have you been civil engineer?
A. Since I have lived in St. Louis.
Q. How long have you lived in St. Louis?
A. Over twenty-five years.
Q. Did you ever work for the city of St. Louis?
A. Yes, sir.
Q. In its surveying department?
A. Yes, sir.
Q. How long?
A. About eight years.
Q. Did you ever make a survey of the property in question?
A. Yes, sir.
Q. (Showing plat to the witness.) Did you make that plat?
A. Yes, sir.
Q. Is it correct?
A. It is correct.

By Mr. BELL: I offer the plat in evidence at this point in order to show it to the jury and have it explained.

(Here insert plat No. 1.)

(Here follows map marked p. 18.)

19 Q. Show the jury the plat here. Where is the ground in front of block 868 on the Mississippi river.
A. It is here. (Witness points out the ground.)

Q. What are these lines running north and south there?
A. Railroad tracks.
Q. State whether or not that ground is embraced in lot 2 if produced to the river?
A. Yes; it would be.
Q. This ground in front of block 868 on the south is bounded by the north line of what?
A. Trudeau street.
Q. The north line or the south line?
A. By the north line of Trudeau street produced to the Mississippi river.
Q. On the north it is bounded by the north line of Russell avenue produced to the Mississippi river?
A. Yes, sir.
Q. And on the west by the front line of block 868?
A. Yes, sir.
Q. And on the front by the Mississippi river?
A. Yes, sir.
Q. What is the distance to the river?
A. Two hundred and ten feet.
Q. And to the south end?
A. Two hundred and forty feet.

Cross-examination by W. C. MARSHALL, Esq.:

Q. Did you make this plat?
A. I copied it from city field-notes. I got them from Mr. Pitzman.
Q. You began your survey where?
A. I began my survey at the wharf—at the levee.
Q. Did you begin at the river?
A. No, sir; I had my field-notes there on the wharf—the levee line of block 868.
Q. The east line of block 868?
A. Yes, sir.
Q. Did you, in point of fact, survey anything except the property which lies between the east line of block 868 and the river?
A. I did not survey anything else.
Q. How did you get the information upon which you drew these lines showing Carondelet avenue, Jackson street, Columbus street, Barton street, Kosciusko street, and Main street, running north and south, and these other streets running east and west?
A. I said Mr. Pitzman has a copy of the field-notes and he gave them to me.
Q. You just made a copy of the plat that he had?
A. I made a sketch of all these blocks stated in that United States survey.
Q. You did not run these lines on these blocks at all?
A. No, sir.
Q. You took a copy of the plat that he had in his office?
A. Yes, sir.

Q. And you drew these lines there?

A. Yes, sir.

21 Q. And then you went down to the place, or did you go to that place at all?

A. Yes, sir; I did.

Q. When?

A. On the ninth day of April, 1892.

Q. Then you knew of this east line of block 868 and the survey from there to the river?

A. Yes, sir.

Q. From Trudeau street to the south, what would be the north line of Russell avenue if Russell avenue ran through to the river?

A. I established this line of block 868.

Q. Then what did you do?

A. I established the position of the tracks.

Q. Of the railroad tracks?

A. Yes, sir.

Q. How many railroad tracks did you find there?

A. Eight tracks.

Q. Did you ascertain from your field-notes or in any other way how far it is from the east line of Carondelet avenue to the river bank?

A. No, not by the field-notes, because I did not make the survey. I made the plat according to the scale.

Q. You said in answer to Mr. Bell's question that this was the property which lay east of lot 2, as shown in Douchouquette's subdivision?

22 A. The property all lies east of what was originally lot 2, in Douchouquette's addition—east of block 868.

Q. I am talking about block 2 of Douchouquette's survey (handing a plat to witness). Take this plat, which has been offered in evidence, marked "Plat of addition to the city of St. Louis, made by John P. Douchouquette, Theodore Papin, John B. Lesperance, and B. W. Alexander." Now, can you tell the jury how far on this plat it was from Carondelet avenue to the river at the point marked here, H. Picot measures from the east line of Carondelet avenue to the river bank?

A. About 1,840 feet.

Q. Is this plan drawn according to a scale?

A. Yes, sir.

Q. The whole of it?

A. The whole of it.

Q. From Carondelet avenue to the river?

A. Yes, sir.

Q. Tell the jury how many feet is shown by that plat between the east line of Carondelet avenue and the river as it is now?

A. About 2,660 feet.

Q. So that there is about 810 feet more lying east of Carondelet avenue and west of the west bank of the Mississippi river now than there was when this plat was drawn in 1839?

A. Yes, sir.

Q. And the portion that is being set off here you say is that part of block 868 and has a depth of 210 feet westwardly from the river on the north side and 240 feet on the south end?

A. Yes, sir.

23 Q. That is the part you surveyed?

A. Yes, sir.

Q. That is a part you say that lies on this side of block 868?

A. Yes, sir.

Q. Will you please measure that and tell the jury what the depth from Main street eastwardly of city block 868 is?

A. About 510 feet.

Q. According to your measurement, the whole of what is now city block 868, in 1839, when the Duchouquette addition was made, was in the river, was it not?

A. Yes, sir.

Q. And more, too? All of the 210 feet that is now east of city block 868 and all of block 868 as it is now shown on this plat that you had made—all of this property shown by the lines on this plat, east of what you designate as Main street, and which is marked on here block 868, and all of that portion which is shown as having railroad tracks on it in 1889, according to the Douchouquette plat, was in the Mississippi river?

A. Yes, sir.

Q. And something more than that, too, according to the measurements?

A. Yes; according to the measurements.

Q. What is now Main street was then in the Mississippi river, according to that, too, was it not?

A. Yes, sir.

Q. How long have you known that property down there?

24 A. I have been there—I may say I have made surveys there.

Q. When?

A. About five or six years ago.

Q. Was that the first you ever saw of it?

A. Yes; I saw it 25 years ago.

Q. That is what I want to get at. You saw it 25 years ago?

A. Not exactly at the same place, but the whole neighborhood on the river bank.

Q. Did you survey that country or did you just pass by there?

A. I only passed by there about 25 years ago. I did not survey there.

Q. What was its condition then? Was there as much land east of the Mississippi then as there is now?

A. I do not know at all about that. I did not take any notice.

Q. When you went down there to make this survey who did you find or what did you find on this part of this property that lies east of block 868?

A. I found railroad tracks.

Q. Did you find anything else?

A. No, sir; only railroad wagons on the tracks.

Q. Anything else than that?

A. No, sir.

Q. How many feet south of Lesperance street is that north line of Russell avenue that lies eastwardly of the river?

A. About 276 feet and eight inches—not to the north line—that is, to the south line.

Q. Now, let us try that again. How many feet south of
25 Lesperance street is the north line of Russell avenue, if it were produced eastwardly to the river?

A. About 226 feet and 8 inches.

Q. You did not find anything but railroad tracks on there?

A. No, sir.

Q. Did you find any portion of the works of the Sectional Dock Company there?

A. No, sir; it was high water and I did not see anything there.

Q. You did not see any sheds around there?

A. No, sir.

Q. Any houses of any kind?

A. Not on the tracks; no, sir.

Q. Nothing but railroad tracks?

A. No, sir.

Q. Any timber?

A. Well, there was some timber there.

Q. Where was it?

A. The railroad wagons brought some lumber there; they had been piling lumber there.

Q. The railroad wagons brought lumber there?

A. Yes; there was some lumber there.

Q. About how much lumber did you see piled on that place between Russell avenue and Trudeau street?

A. About two or three car-loads that they had been piling there.

Q. Piled close to the track?

26 A. Yes; certainly upon the side of the track.

Q. Was there any fence around it?

A. No.

Q. You found eight tracks on there?

A. Yes.

Q. (Showing a plat to the witness.) I show you a drawing and ask if you can tell the jury whether or not that drawing also correctly represents the property in front of block 868, between that and the river.

A. I did not see that here. There is eight tracks and some switches going in here.

Q. You found eight tracks, just as is shown on this plat that I show you now?

A. Yes, sir.

Q. You saw this old barge hole there?

A. No, sir.

Q. You did not see anything there?

A. No, sir.

Q. Did you go there to look?
A. No, sir.
Q. Russell avenue produced eastwardly on this plat would strike up here?
A. Yes, sir.
Q. And Trudeau avenue down there?
A. Yes, sir.
Q. Now, did you cover all that front to see what was on it?
A. Yes, sir.
27 Q. And you found nothing but eight tracks?
A. No, sir.
Q. Did you see the shop here just north of Russell avenue?
A. I do not remember.
Q. Did you see an engine shed just south of Lesperance street?
A. I don't remember.
Q. You did not look a little further north on Russell avenue to see what was on that portion of the property north of Russell avenue, did you?
A. I don't know whether there was a shed there or not.
Q. You do know that plat shows the condition of the tracks in there in front of block 868?
A. Yes, sir.

Redirect examination by LEVERETT BELL, Esq.:

Q. Will you take your pencil and draw on this plat that you made the bank of the Mississippi river as shown in 1839 by the Duchouquette addition? Did you show Columbus street on the map?
A. Yes, sir.
Q. Now, show where it is on this map in reference to Columbus street. Have you got the distances from Columbus street to here all along, so that you could do that? (The witness makes some figures and draws a pencil line on the map.)
A. There is the line.
Q. Write on there the west line of the Mississippi as shown in 1839. (The witness writes on the map.)
Q. (Counsel shows map to the jury.) Mr. Dziatzko has in-
28 dicated the bank of the Mississippi river in 1839. That is where the water was in 1839, and that is where the water is today, in 1892. That space represents the growth between 1839 and 1892. This is the line of the river bank in 1839 as shown by Duchouquette's plat. Here the water is in 1892, and this is the land which has been accreeted between 1839 and 1892.
Q. What is the appearance of this ground between the river bank and the line in 1839 and the river bank in 1892? What was the character of the soil?
A. The river went back.
Q. I mean the nature of the ground—was it loose dirt or sand?
A. It was loose dirt.
Q. What I want to know is whether this ground presents the

appearance of having been attached to the river bank by the action of the water.

By Mr. MARSHALL: I object to the question in that shape.

By Mr. BELL:

Q. I understood you to say, Mr. Dziatzko, you are about to locate lot 2, that was sold to Picot, on this plat of Duchouquette's addition in 1839?

A. Yes, sir.

Q. And that this survey that you made here is on lot 2, produced eastwardly?

A. Yes, sir.

Q. If you produce these lines eastwardly they embrace lot 868 and the ground in front of it to the Mississippi river?

A. Yes, sir.

29 Q. When Duchouquette made his plat in 1839, the Mississippi river ran along there?

A. Yes, sir.

Q. Now the Mississippi river runs along here?

A. Yes, sir.

Q. This railroad that you see between here seems to be the line of the wharf?

A. The line of the wharf; yes, sir.

Q. Now, at the time you made this survey in 1892, when was it in that year?

A. On the ninth day of April.

Q. State whether or not the water was high on the Mississippi river.

A. Yes, sir; the water was very high.

Q. When the water recedes to the ordinary stage of water that would leave it some feet wider that it is represented here?

A. Yes, sir.

Q. Is Lesperance street shown on this plat?

A. Yes, sir.

Q. That is Lesperance street?

A. Yes, sir.

Q. Now tell me whether a line 462 feet south of the south line of Lesperence street would embrace this property?

A. 462 feet would come to here (indicating a point on the map).

Q. Come a little inside of it?

A. Yes, sir.

30 Q. Fifteen or twenty feet? About how many feet south of the north line of this property would a line 462 feet south of the south line of Lesperance street be?

A. That would come about here.

Q. How many feet would it be?

A. About one-half.

Q. Running down from a line 462 feet south of the south line of Lesperance street a few feet would embrace the south part of the property sued for?

A. Yes; the south half of the property sued for.
By Mr. BELL: That is all.

Also that in December, 1839, John B. Duchouquette and J. B. Lesperance and Theodore Papin made an addition to the city of St. Louis, on which lot 2 is shown. This addition embraced lots 1, 2, 3, 4, 5, as shown on the Papin deed, and contained the tract of ground conceded and confirmed to Brazeau and conveyed to Papin as aforesaid. At the north of the tract Lesperance street is established, extending from Carondelet avenue *avenue* eastwardly to the river. Columbus street is established, running southwardly from Lesperance street across the center of the tract and entering Second street on the south of the tract. No subdivision is made of lots 2, 3, 4, and 5 east of Columbus street and between it and the river. Picotte, Papin, Duchouquette, and Lami streets, in the order named, are laid out south of Lesperance street and parallel thereto and extend from Carondelet avenue to Columbus street.

It was further shown that Honore Picotte died in the year
31 1860, and that his wife died in 1869; that two children of said marriage survived their parents, of whom plaintiff was one, and her sister, Mrs Wilkinson, was the other; that the plaintiff was married in 1865 to Dr. L. T. Pim, and that they lived together as husband and wife until the death of Dr. Pim, in 1888. The will of Honore Picotte was introduced in evidence, by which all the estate and property of said Picotte was devised to his wife for life, with remainder in fee to the two children, of whom plaintiff was one.

There was evidence tending to show that the value of the premises sued for was $40,000, and the monthly value of the rents and profits of the same was $200.

There was evidence that the patent of the United States for the tract of ground conceded & confirmed to Joseph Brazeau as aforesaid was never issued.

Plaintiff gave in evidence the act of Congress approved June 6, 1874, entitled "An act for obviating the necessity of issuing patents for private land claims, and for other purposes;" also the act of the General Assembly of the State of Missouri approved March 24, 1875, entitled "An act concerning the act of Congress of June 6, 1874."

There was also evidence that in 1884 the city of St. Louis rented the premises in controversy to the St. Louis Sectional Dock Company.

Defendants' Case.

Counsel for defendant- offered in evidence certified copy of a lease by the city of St. Louis to the Sectional Dock Company, dated January 12, 1870:

Lease from City of St. Louis to Sectional Dock Co., Dated Jan. 15, 1870.

32 This contract, made and entered into this fifteenth day of January, A. D. 1870, by and between the city of St. Louis of

the first part and the Sectional Dock Co. of the second part, witnesseth: That by virtue of section 51 of article 1 of city ordinance 7097 the undersigned comptroller and harbor master have leased to the said Sectional Dock Co. the following-described ground or portion of the wharf, viz: Commencing at the intersection of the south line of Lesperance street, with the wharf, fifteen feet from the north end of the blacksmith shop and thence running south twelve hundred feet. At the rate of twelve hundred (1,200) dollars a year payable quarterly in advance. The wagon road and bridge now on said premises to be kept open at the cost of the lessees.

S. D. BARLOW, [SEAL.]
Comptroller.
R. P. CLARK, [SEAL.]
Harbor Master.
JOHN D. DAGGETT, [SEAL.]
Agent & Part Owner Sect'l Dock Co.

OCT. 15TH, 1875.

This contract is hereby cancelled, the property having been released to the St. Louis Sectional Dock Co. (successors to Sectional Dock Co.). New lease takes effect Oct. 1, 1875.

RICH'D P. HAUENKAMP,
Comptroller.
TIM. HICKEY, *Harbor Master.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, the undersigned, register of said city, do hereby certify the foregoing to be a true copy of lease — city of St. Louis to Sec-
33 tional Dock Co., Jan. 15, 1870, the original whereof being on file in this office. Ord. 7097.

Witness my hand and seal of the city of St. Louis this 13th day of Feb'y, 1892.

[SEAL.] JOS. H. WHERRY, *Register.*

Also lease from the city of St. Louis to the Sectional Dock Co., dated the 15th of October, 1875

Lease from the City of St. Louis to St. Louis Sectional Dock Co., Dated Oct. 15, 1875.

This contract made and entered into this fifteenth day of October, 1875, by and between the city of St. Louis, party of the first part, and the St. Louis Sectional Dock Co. party of the second part, witnesseth: That by virtue of section 51, article 1, chapter 11, Revised City Ordinances of 1871, the undersigned comptroller and harbor master of the city of St. Louis have leased to the said St. Louis Sectional Dock Co. the following-described ground or portion of the wharf, viz: Commencing at the intersection of the south line of Lesperance street with the wharf, thence running south twelve hun-

dred feet, at the rate of one thousand dollars per annum payable quarterly in advance, commencing October 1st, 1875. The wagon road now on said premises to be kept open at the cost of the lessees. The city reserves the right to make improvements on said premises and the said St. Louis Sectional Dock Co. hereby agrees to remove at their own cost and expense, any buildings or any articles belonging to it that the nature of improvements to be made by the city may require. Provided, that the city through its city engi-
34 neer shall give at least three months' notice to said lessees of the intended improvements, specifying what portion of said premises will be needed for the proposed improvements.

This contract is made subject to the provisions of existing laws and ordinances applicable thereto.

RICH'D P. HAUENKAMP, *Comptroller.*
TIM. HICKEY, *Harbor Master.*
WM. THOMAS,
Sec'y St. Louis Sectional Dock Co.

STATE OF MISSOURI, } ss :
City of St. Louis, }

I, the undersigned, register of said city, do hereby certify the foregoing to be a true copy of lease by city of St. Louis to the St. Louis Sectional Dock Co. of portion of the wharf, the original whereof being on file in this office.

[SEAL.] Witness my hand and the seal of the city of St. Louis this 15th day of February, 1892.

JOS. H. WHERRY, *Register.*

Also lease from the city of St. Louis to the Sectional Dock Company, dated the 30th day of September, 1879 :

Lease from City of St. Louis to St. Louis Sectional Dock Company, Dated Sept. 30, 1879.

This agreement, made this thirtieth day of September, 1879, by and between the city of St. Louis through Charles Pfeifer, harbor and wharf commissioner, and E. L. Adreon, comptroller, party of the first part and the St. Louis Sectional Dock Company,
35 party of the second part, under authority of section 22 of ordinance No. 11100.

Witnesseth, that the said party of the first part does by these presents, in consideration of covenants hereinafter mentioned rent to the said St. Louis Sectional Dock Company, party of the second part, the following-described portion of the wharf, to wit: Bounded west by a line parallel to and sixty (60) feet east of the western boundary line of the wharf, east by the Mississippi river, north by a line rectangular to the western boundary line of the wharf and intersecting said western boundary line of the wharf at a point two hundred (200) feet north of its intersection with the north line of Trudeau street, and south by a line rectangular to the western boundary line of the wharf and intersecting said western boundary

line of the wharf at a point five hundred and fifty (550) feet south of its intersection with the north line of Trudeau street; Provided, however, that the St. Louis Sectional Dock Company shall keep the present wagon road through said portion of wharf open and unobstructed to a width of at least twenty (20) feet for the public travel along the wharf, and that the erection of all buildings on said portion of wharf, and the making of any improvement changing the surface of the ground or in any way effecting the river shore and landing shall be done under the supervision of the harbor and wharf commissioner and subject to his approval.

In consideration of the foregoing the said St. Louis Sectional Dock Company, party of the second part, hereby agrees and binds itself to pay to the city of St. Louis the sum of sixty-five (65)
36 dollars per month payable in advance commencing on the first day of October, 1879, and the St. Louis Sectional Dock Company hereby further agrees to remove from the above-described portion of the wharf, at its own cost and expense, all buildings and other obstructions having been placed there by it, whenever this agreement shall be terminated from any cause whatever, within ten days after such termination.

This agreement shall not be binding for a longer period than the time for which the rent has been prepaid, which shall not be longer than one month, but may be removed at the expiration of such period, and the making out of a new bill of rent by the party of the first part, and the payment of the same by the party of the second part shall constitute such a renewal for the time covered by the new bill.

In testimony whereof the parties above named have set their hands this thirtieth day of September, 1879.

THE CITY OF ST. LOUIS,
By CHARLES PFEIFER,
Harbor & Wharf Commissioner.
E. L. ADREON, *Comptroller.*
THE SECTIONAL DOCK COMPANY,
By THOS. P. MORSE, *Sec'y.*

CITY COUNSELLOR'S OFFICE, *Oct. 3rd*, 1879.

The foregoing agreement is in due form according to law.

LEVERETT BELL,
City Counsellor.

Also lease dated the 13th day of May, 1884, from the city of St. Louis to the Sectional Dock Company.

37 *Lease from City of St. Louis to St. Louis Sectional Dock Company, Dated May* 13, 1884.

This agreement made this 13th day of May, 1884, by and between the city of St. Louis, through John Alt, harbor & wharf commissioner, and E. L. Adreon, comptroller, party of the first part, and the St. Louis Sectional Dock Company party of the second part, under au-

thority of ordinance No. 12795, approved March 29th, 1884, a copy of which is hereto attached, witnesseth:

That the said party of the first part, does by these presents in consideration of the covenants hereinafter mentioned, lease to the St. Louis Sectional Dock Company, party of the second part for a period ending January 1st, 1899, the following-described portions of the unimproved wharf, viz:

Bounded north by a line parallel to and four hundred and sixty-two feet south of the south line of Lesperance street continued eastwardly; east by the east line of the public wharf; south by a line parallel to and one thousand feet south of the aforesaid northern boundary line; west by a line parallel to and sixty feet east of the western boundary of the public wharf.

Said portion of the wharf shall be used by the said St. Louis Sectional Dock Company for the purposes of building, launching, landing, repairing and overhauling steamboats, barges and other water craft, and for the landing and storing of wood, iron, lumber and other material and articles repaired for use in their said business; and the said St. Louis Sectional Dock Company shall have the right to construct and operate on said portion of the wharf, docks, ways, sheds, railroad tracks and derricks and other erections and
38 machinery to facilitate their said business. Provided however, that all such improvements shall be subject to the approval of the harbor and wharf commissioner.

For the privilege herein granted the said St. Louis Sectional Dock Company or its assigns shall pay to the city of St. Louis the sum of two thousand dollars per annum, payable semi-annually in advance. The said St. Louis Sectional Dock Company, or its assigns, shall keep the portion of wharf hereby leased, free from drift-wood or other improper obstructions during the continuance of this lease, and at its expiration shall remove at its own expense its tracks or erections.

Nothing in this lease shall be so held or construed as to exempt any boat, barge, or other water craft landing at said portion of the wharf from the payment to the city of the legally established wharfage rates, nor shall the said St. Louis Sectional Dock Company or its assigns charge directly or indirectly any steamboat, barge, or other water craft having business there, for the privilege of landing at said portion of wharf; nor shall this lease be so construed as to interfere with the privileges heretofore granted to the St. Louis Belt Railway Company under provisions of ordinance No. 12372.

In testimony whereof the parties above named have set their hands and seals this 13th day of May, 1884.

THE CITY OF ST. LOUIS,
By JOHN ALT,
Harbor & Wharf Commissioner.
E. L. ADREON, *Comptroller.*
ST. LOUIS SECTIONAL DOCK CO.
H. B. LOUDERMAN, *P't.*

Attest: THOS. P. MORSE, *Sec'y.* [SEAL.]

39 CITY COUNSELLOR'S OFFICE, *May* 4, 1884.

The foregoing agreement and bond are in due form according to law.

LEVERETT BELL,
City Counsellor.

(12795.)

An ordinance to lease to the St. Louis Sectional Dock Company a portion of the unimproved wharf south of Lesperance street.

Be it ordained by the municipal assembly of the city of St. Louis as follows:

SECTION 1. The harbor & wharf commissioner and the comptroller are hereby authorized and instructed to lease to the St. Louis Sectional Dock Company for a period ending January 1, 1899, the following-described portion of the unimproved public wharf: Bounded north by a line parallel to, and four hundred and sixty-two (462) feet south of the south line of Lesperance street, continued eastwardly; east by the east line of the public wharf; south by a line parallel to and one thousand (1,000) feet south of the aforesaid northern boundary line; west by a line parallel to and sixty (60) feet east of the western boundary of the public wharf. Said portion of the wharf shall be used by the said St. Louis Sectional Dock Company for the purpose of building, launching, landing, repairing and overhauling steamboats, barges and other water craft, and for the landing and storing of wood, iron, lumber and other materials and articles required for use in their said business; and the said St. Louis Sectional Dock Company shall have the right to construct and operate on said portion of the wharf,
40 docks, ways, sheds, railroad tracks, derricks and other erections and machinery to facilitate the conduct of their said business. Provided, however, that all such improvements shall be subject to the approval of the harbor and wharf commissioner.

SEC. 2. For the privilege herein granted the said lessees or their assigns shall pay to the city of St. Louis the sum of two thousand dollars per annum, payable semi-annually in advance.

SEC. 3. The said lessees or their assigns shall keep the portion of the wharf hereby leased free from drift-wood or other improper obstructions during the continuance of said lease, and at its expiration shall remove at their own expense their tracks or erections.

SEC. 4. Nothing in this ordinance or the lease hereby authorized shall be so held or construed as to exempt any boat or barge or other water craft landing at said portion of the wharf from the payment of lawful wharfage; nor shall said lessees or their assigns ever make any charge for landing at said wharf by boats, barges or other water craft having business there; provided, however, that nothing in this ordinance, or in the lease hereby authorized to be made, shall be so construed as to interfere with the privilege heretofore granted to the St. Louis Belt Railway Company under provisions of ordinance No. 12372.

SEC. 5. This ordinance shall not take effect unless the said St. Louis Sectional Dock Company shall, within sixty days from the approval hereof, file in the office of the city register its written acceptance of the provisions hereof, and its penal bond in the sum of ten thousand dollars with two or more securities, owners
41 of unincumbered real estate in the city of St. Louis, to be approved by the mayor and council, conditioned that it will save the city of St. Louis harmless from any and all damages that may arise from the construction and operation of said docks, ways, sheds, railroad tracks, derricks and other erections and machinery, and will faithfully comply with all the provisions of this ordinance in each and every respect.

Approved March 29, 1884.

Also an acceptance of the Sectional Dock Company of the provisions of ordinance 12975, which authorizes the lease just mentioned:

Acceptance of St. Louis Sectional Dock Co. of All Terms of Ordinance No. 12795.

The St. Louis Sectional Dock Company, a corporation organized under the laws of the State of Missouri, hereby accept all the terms of ordinance number 12795 of the city of St. Louis, entitled "An ordinance to lease to the St. Louis Sectional Dock Company a portion of the unimproved wharf south of Lesperance street."

Approved M'ch 29, 1884.

H. B. LOUDEMAN, *P't.*

Attest: THOS. P. MORSE, *Sec'y.* [SEAL.]

Also certified copy of ordinance 12975, authorizing the St.
42 Louis Transfer Railway Company to construct and operate its road:

Certified Copy of Ordinance 12975, *Authorizing St. L. Transfer Co. to Construct and Operate its Road.*

(12975.)

An ordinance authorizing the St. Louis Transfer Railway Company to construct and operate its road.

Be it ordained by the municipal assembly of the city of St. Louis as follows:

SECTION 1. That permission and authority is hereby granted to Miles Seils, Marcus A. Wolf, Alexander Hamilton, John P. Kaiser, Henry Overstolz and Rufus J. Lackland, and their successors and assigns, when duly incorporated according to law as the St. Louis Transfer Railway Company, to construct and operate a railway by steam, with single or double tracks, beginning at a point in the line of the St. Louis, Iron Mountain and Southern railway at its inter-

section with the southern line of Arsenal street, and running thence with double or single track across Arsenal street northeastwardly along the most practicable line through city blocks two thousand and thirteen, seven hundred and seventy-two, seven hundred and seventy-three, and seven hundred and seventy-four and across Dorcas street, Commercial street and Lynch street, to a point on the wharf; thence northwardly along said wharf with single or double track to a point north of the south line of Almond street; thence along, over and upon the tracks of the St. Louis, Iron Mountain and Southern Railroad Company to the north line of Morgan street; thence with single track northwesterly across the wharf or through the northeast
43 part of the city block nineteen and across Biddle street to a point in the carriageway of Lewis street; thence northwardly to a point between city blocks two hundred and twenty-three and two hundred and thirty-one and two hundred and thirty-two, crossing Ashley street, O'Fallon street, Dickson street and Smith street; thence northeastwardly across Florida street and through city block two hundred and thirty-three to a point on the wharf east of the Wabash, St. Louis and Pacific railway; thence with a double track northwardly along said wharf across Mullanphy street, Howard street, Mound street, Bogy street, Lebaume street, Tyler street, Chambers street, Madison street, and Clinton street; thence northwestwardly diagonally through the Exchange square and across North Market street to a point in Hall street; thence northwardly along the centre of Hall street to the northern line of Bremen avenue; thence over and across city blocks twelve hundred and twenty-two and twelve hundred and twenty-three to the intersection of McKissock street; thence along McKissock street east of the right of way of the Wabash, St. Louis and Pacific railway to the intersection of the switches of the St. Louis water works. The alignment, location, and the grade of the road shall be submitted to the board of public improvements and shall be subject to its approval. Provided, however, that where any part of said wharf shall have been leased by the city of St. Louis, said company shall obtain the consent of the lessees thereof or otherwise secure the right according to law, before laying its tracks upon the portions so leased; provided, also, that said company shall not occupy along said wharf a space more than twenty-eight feet in width with its tracks;
44 and provided further, that the tracks of said company along the public wharf shall be laid so as not to injur- or destroy any tracks now laid by any other corporation or any inclined planes now operated under permission or lease from the city, or to interfere with or to obstruct the use of said wharf as a public highway; and provided, further, that said tracks shall not be laid within the western thirty feet of the crown of the wharf; and provided, further, that the location of this road shall not in any way interfere with any unforfeited rights of way heretofore granted.

SEC. 2. Said St. Louis Transfer Railway Company shall transfer and switch or pull to or from any transfer-boat, and connecting lines and switches, cars for all persons or companies along the line hereby authorized, at equal rates, and its charges for switching, in-

cluding such pulling to and from said boats and connecting lines and switches, and the return of all emptied cars shall not exceed one dollar per car over any portion of the route between Arsenal street and the switches of the St. Louis water works. Said St. Louis Transfer Railway Company shall switch or move all cars within eight hours after notice and receipt of car or cars from connecting railroads or transfer-boats.

SEC. 3. Said company may construct and operate a single or double inclined plane from its tracks to the water's edge on the wharf, at some one point between Covenant and Soulard streets, to be designated by the harbor and wharf commissioner, and approved by the board of public improvements. The same to be constructed under the supervision and to the satisfaction of the board of public improvements, and in such a manner as not to obstruct pub-
45 lic travel. And all persons or transfer companies engaged in transferring cars by boat across the Mississippi river shall have the right to land boats or barges at said incline, for the purpose of delivering or receiving cars from said company free of charge, provided that the same shall be done without unnecessary delay.

SEC. 4. The tracks of said railway shall be laid as designated by the board of public improvements, or in accordance with plans presented by said company and approved by said board; and whenever the levee or Front street is now or hereafter shall be *hereafter* paved, the said company shall pave the space between its rails, between its tracks and for two feet on the outside of each track, with granite blocks, and keep the same in good repair, at its own cost and expense, and to the satisfaction of the board of public improvements. On Lewis street from the south line of Biddle street to the north line of Florida street, the space between the rails of said track, and for two feet outside thereof, shall be paved by said company with granite blocks under the supervision and to the satisfaction of the board of public improvements, and shall be kept in good repair by said company at its own cost and expense, under the supervision and to the satisfaction of the board of public improvements; on all streets across which the said railway company shall lay its tracks and the rails, and for a space of six feet outside of its tracks shall be paved with granite and maintained in good order and condition to the satisfaction of the street commissioner and at the cost and expense of said company. Whenever the municipal assembly shall hereafter provide for the paving of
46 Hall street or McKissock street or any portion thereof, the said railway company shall pave the space between its tracks and rails for the space of two feet outside thereof with granite or such material as shall be approved by the board of public improvements, and maintain the same at the cost and expense of the said company, and to the satisfaction of the street commissioner.

SEC. 5. Said company shall, with the approval of the board of public improvements, connect their tracks, by switches and side tracks, with any warehouse, factory, store, lumber, coal or stock yards, or depot yards and transfer-boats of any transportation

company or other commercial or manufacturing establishment, located adjacent to the railway of said company. Said switches and side tracks shall be so constructed as in no manner to interfere with the public use of the streets or alleys across which they may be laid, and they shall be removed by said company *whether* it shall be so directed by the municipal assembly, but no such switches or side tracks shall be laid along or across any alley, street or public wharf unless authority be first granted by the municipal assembly.

SEC. 6. Said company shall commence the construction of the line hereby authorized within sixty days after its acceptance of this ordinance, and shall complete and have the same in operation within fifteen months thereafter, and any failure to do so shall forfeit all the rights and privileges hereby granted.

SEC. 7. Said company shall not run its trains within the old city limits at a rate of speed exceeding six miles per hour, and shall not stand cars opposite to or across any street or highway,
47 when not in motion longer than five minutes, and when moving the bell of the engine shall be constantly sounded; and if the train be backing a man shall be stationed on top of the rear car, to give danger signals; and no train shall at any time be moved within the city limits unless it be manned with experienced brakemen at their posts, who shall be so stationed as to see the danger signals from the engines; and the said company shall, at its own cost, maintain and keep watchmen and gates at such street crossings as may be designated by the board of public improvements. The signal of danger by a steam whistle shall in no case be given except in giving the usual signals for running trains. Said company, its servants or agents shall not at any time interfere with or obstruct the moving of passengers or freight to or from the boats lying at the levee. Said company shall *com*form and comply with all ordinances of the city of St. Louis, now in existence or hereafter enacted; any violation of the provisions of this section by said company, its agents or servants shall be deemed a misdemeanor, and upon conviction thereof, the party so convicted shall be fined for each offense not less than the sum of twenty-five dollars.

SEC. 8. In consideration of the rights and privileges herein granted to the said St. Louis Transfer Railway Company to maintain and operate its road along Hall street, as authorized by section one of this ordinance, said company shall grade and fill Hall street from North Market street to Bremen avenue, forty feet wide to the established grade thereof, within twelve months from and after
48 the date of the approval of this ordinance, and shall within three years thereafter complete the grading and fil-ing of said street one hundred feet wide, to the established grade thereof, at its own cost and expense, and under the supervision of and to the satisfaction of the board of public improvements; provided, however, that should the St. Louis Belt Railway Company grade and fill said Hall street, as provided in ordinance number twelve thousand three hundred and seventy-two, then the said St. Louis Transfer Railway Company shall pay into the city treasury the sum of twenty thou-

sand dollars, which sum shall become absolutely the property of the city of St. Louis. And failure on the part of said St. Louis Transfer Railway Company to comply with any of the provisions of this section shall cause a forfeiture of all the rights and privileges herein granted.

SEC. 9. Said company shall within sixty days after the approval of this ordinance file with the register its acceptance of the provision hereof, and shall accompany the same with its penal bond in the sum of thirty thousand dollars, with two or more securities, owners of unincumbered real estate situate in the city of St. Louis to be approved by the mayor and counsil, conditioned that it will comply with all the requirements and conditions of this ordinance and hold the city of St. Louis harmless from any claim for damages arising out of the construction and operation of the road authorized by this ordinance. At the time of filing said acceptance and bond, said company shall pay into the treasury of the city of St. Louis the sum of one thousand dollars, and on the first day of January, eighteen hundred and ninety-five, and each and every year
49 thereafter, during the continuance of this franchise, the sum of one thousand dollars, which shall become absolutely the property of the city of St. Louis. Should said company fail or refuse to file said acceptance and bond, and fail or refuse to pay said amount, into the city treasury as herein provided, all the rights and privileges herein granted shall be null and void.

SEC. 10. The rights, and privileges herein granted shall continue for the term of thirty years from and after the approval of this ordinance.

Approved June 11, 1884.

I, Joseph A. Wherry, register of the city of St. Louis, hereby certify the foregoing to be a true copy of the original, on file in this office, of an ordinance passed by the municipal assembly of the city of St. Louis entitled "An ordinance authorizing the St. Louis Transfer Railway Company to construct and operate its road and numbered 12975."

In testimony whereof I have hereunto set my hand and affixed the seal of the city of St. Louis this 13th day of February, 1892.

JOSEPH H. WHERRY, *Register*. [SEAL.]

Also copy of ordinance No. 13452, amendatory of ordinance 12975:

Copy of Ord. No. 13452, *Amendatory of Ordinance* 12975.

(13452.)

An ordinance amendatory of ordinance number twelve thousand nine hundred and seventy-five, entitled "An ordinance authorizing the St. Louis Transfer Railway Company to construct and operate its road, approved June eleventh, eighteen hundred and eighty-four."

Be it ordained by the municipal assembly of the city of St. Louis as follows:

SECTION 1. That ordinance number twelve thousand nine hundred and seventy-five, entitled "An ordinance authorizing the St. Louis Transfer Railway Company to construct and operate its road approved June eleventh eighteen hundred and eighty-four, is hereby amended by striking out section one and inserting in lieu thereof the following:

SECTION 1. That the St. Louis Transfer Railway Company is hereby authorized to construct, maintain and operate a railway by steam power with single or double tracks beginning at a point in the line of the St. Louis Iron Mountain and Southern railway at its intersection with the southern line of Arsenal street, and running thence with double or single track across Arsenal street northwestwardly through city block twenty hundred and thirteen to a point in Commercial street, north of the north line of Dorcas street, thence along Commercial street with a single track to its intersection with city block seven hundred and seventy-four, thence over and across city block seven hundred and seventy-four with a single track, to a point on the wharf between Lynch street and Louisa street, thence northwardly along said wharf with single or double track to a point north of the south line of Almond street, thence along, over and upon the tracks of the St. Louis Iron Mountain and Southern Railway Company to the north line of Morgan street, thence with a single track northwestwardly across the wharf or through the northeast part of the city block nineteen,
51 across Biddle street, to a point in the carriageway of Lewis street thence along Lewis street, across Ashley street, O'Fallon street, Dickson street, Smith street, Florida street, northeastwardly across city block two hundred and thirty-three, Mullanphy street, and city block two hundred and thirty-four, to a point on the wharf east of the Wabash, St. Louis and Pacific railway thence along the wharf with single or double track across Howard street, Mound street, Bogy street, Labeaume street, Tyler street, Chambers street, Madison street and Clinton street, thence northwestwardly across Exchange square, Monroe street, North Market street and Benton street to a point in Hall street, thence northwardly along Hall street to the northern line of Bremen avenue, thence across city blocks twelve hundred and twenty-two and twelve hundred and twenty-three to the intersection of McKissock street, thence northwardly

along McKissock street, across Angelica street, to the north line of Ferry street, thence by the most practicable route to the intersection of the switches of the St. Louis water works. The alignment, location and grade of the road shall be submitted to the board of public improvements and shall be subject to its approval, provided, however, that where any part of said wharf shall have been leased by the city of St. Louis, said company shall obtain the consent of the lessees thereof, or otherwise secure the right according to law, before laying its tracks upon the portions so leased, provided also, that said company shall not occupy along said wharf a space more than twenty-eight feet in width with its tracks; and provided further, that the tracks of said company along the public wharf shall be laid so as not to injure or destroy any tracks laid by any
52 other corporation or any inclined planes now operated under permission or lease from the city, or to interfere with or obstruct the use if said wharf as a public highway; and provided further, that said tracks shall not be laid within the western thirty feet of the crown of the wharf; and provided further, that the location of said road shall not in any manner interfere with any unforfeited rights of way heretofore granted.

SEC. 2. Ordinance number twelve thousand nine hundred and seventy-five is hereby further amended by striking out section ten and inserting in lieu thereof the following:

SEC. 10. The rights and privileges hereby granted shall continue for the term of thirty years from and after the approval of this ordinance, and the city of St. Louis reserves the right to repeal, alter or amend this ordinance at any time.

Approved December 15th, 1885.

Also a copy of ordinance No. 13497:

Copy of Ordinance No. 13497.

(13497.)

An ordinance prescribing the time for the completion of the railroad of the St. Louis Transfer railway.

Whereas, by city ordinance number 12975, approved June 11, 1884, the St. Louis Transfer Railway Company was authorized to construct and lay its railroad upon certain streets and public places in the city of St. Louis, along the route in said ordinance mentioned within the time by said ordinance prescribed; and,

Whereas, by city ordinance number 13452, approved December 15, 1885, amendatory of said ordinance number 12975, a different route for said railroad was prescribed, but no time was limited for the completion of said railroad, which ordinance has been
53 duly accepted by said St. Louis Transfer Railway Company;

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. The St. Louis Transfer Railway Company is hereby required to complete the construction of its railroad and have the

same in operation upon the route authorized by city ordinance number 12975, as amended by city ordinance 13452, within eighteen months from and after the aporoval of this ordinance, and in case said railroad shall not be completed and in operation within said period the privileges and franchise granted to said St. Louis Transfer Railway Company by ordinance number 12975, as amended by ordinance number 13452, may at any time thereafter be forfeited by the municipal assembly by ordinance enacted for that purpose; provided that if the completion and operation of said railroad within said period shall be prevented or delayed by any legal process, the time of such delay in completing and operating said railroad shall not be included within the period above named.

Approved Feb. 18, 1886.

Also a certified copy of ordinance No. 1805, declaring Front street a part and portion of the wharf, approved February 6th, 1847:

Certified Copy of Ordinance 1805.

Ordinance 1805.

An ordinance declaring Front street, as at present defined by ordinance, part and portion of the wharf.

Be it ordained by the city council of the city of St. Louis
54 That Front street as at present defined by ordinance, shall be and the same is hereby declared to be, part and portion of the wharf, and that so much of any ordinance as comes in conflict with this ordinance, is hereby repealed, provided this ordinance shall not be construed as affecting and unexpired contract for clearing or keeping clean Front street.

Approved, February 6th, 1847.

I, Richard Walsh, register of the city of St. Louis, hereby certify this foregoing a correct, perfect, and true copy from the original roll on file in this office of an ordinance passed by the city council of the city of St. Louis entitled "An ordinance declaring Front street, as at present defined by ordinance, part and portion of the wharf, and numbered eighteen hundred and five."

In testimony whereof I have hereunto set my hand and affixed the seal of the city of St. Louis, this 20th day of April, 1880.

[SEAL.] RICHARD WALSH, *Register*,
Per H. WOODS, *Deputy*.

Also ordinance No. 12799, leasing the wharf to the Wiggins Ferry Company:

Ordinance Number 12799, *Leasing Wharf to Wiggins Ferry Company.*

(12799.)

An ordinance to lease to the Wiggins Ferry Company a portion of the unimproved wharf south of Lesperance street.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

55 SECTION 1. For the purpose of facilitating the transfer of freight between the city of St. Louis and the Illinois shore, the harbor and wharf commissioner and comptroller are hereby authorized and instructed to lease to the Wiggins Ferry Company for a term ending on the first day of January, 1894, the following-described portion of the unimproved wharf, to wit: Measuring from the southwest corner of Lesperance street and the west wharf line, sixty feet and three and one-fourth inches eastwardly in the south line of Lesperance street prolonged to the point of beginning; thence bounded on the west by a line parallel to and sixty feet east of the west line of the wharf, four hundred and seventy-three feet southwardly; thence on the south by a line extending eastwardly at right angles to the west boundary line, to the intersection of the east wharf line as established by ordinance No. 5403; thence on the east by the east wharf line to its intersection with the south line of Lesperance street prolonged; thence on the north by the south line of Lesperance street prolonged, to the point of beginning. Said portion of wharf shall be used by said Wiggins Ferry Company for the purpose of laying down and maintaining railway tracks for landing, storing and switching railway cars; and said company shall keep the portion of wharf herein leased free from drift-wood or other obstructions during the continuance of said lease, and at its expiration remove at its own expense its tracks or erections.

SEC. 2. Nothing in this ordinance or in the lease herein authorized shall be held or so construed as to exempt any boat, barge or water craft landing at said portion of the wharf from the payment of lawful wharfage, nor shall said lessee or its assigns ever
56 make any charge for landing at said wharf by boats, barges or other water craft having business there.

SEC. 3. The Wiggins Ferry Company is hereby authorized to construct, maintain and operate a single railroad track on the wharf from the south line of Lesperance street and for a distance of seven hundred and thirty-six feet and five inches from the north line of Lesperance street prolonged to connect with the incline track of the St. Louis, Iron Mountain & Southern Railway Company. The particular location of said track to be designated by the harbor and wharf commissioner. Said track shall be laid under the supervision and to the satisfaction of the harbor and wharf commissioner, and on the portion of wharf crossing Lesperance street, and said company shall pave the space between the rails of its tracks and for ten feet on each side thereof with granite blocks, and keep the same in good repair and condition with the same material and to the satis-

Ordinance Number 12799, *Leasing Wharf to Wiggins Ferry Company.*

(12799.)

An ordinance to lease to the Wiggins Ferry Company a portion of the unimproved wharf south of Lesperance street.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

55 SECTION 1. For the purpose of facilitating the transfer of freight between the city of St. Louis and the Illinois shore, the harbor and wharf commissioner and comptroller are hereby authorized and instructed to lease to the Wiggins Ferry Company for a term ending on the first day of January, 1894, the following-described portion of the unimproved wharf, to wit: Measuring from the southwest corner of Lesperance street and the west wharf line, sixty feet and three and one-fourth inches eastwardly in the south line of Lesperance street prolonged to the point of beginning; thence bounded on the west by a line parallel to and sixty feet east of the west line of the wharf, four hundred and seventy-three feet southwardly; thence on the south by a line extending eastwardly at right angles to the west boundary line, to the intersection of the east wharf line as established by ordinance No. 5403; thence on the east by the east wharf line to its intersection with the south line of Lesperance street prolonged; thence on the north by the south line of Lesperance street prolonged, to the point of beginning. Said portion of wharf shall be used by said Wiggins Ferry Company for the purpose of laying down and maintaining railway tracks for landing, storing and switching railway cars; and said company shall keep the portion of wharf herein leased free from drift-wood or other obstructions during the continuance of said lease, and at its expiration remove at its own expense its tracks or erections.

SEC. 2. Nothing in this ordinance or in the lease herein authorized shall be held or so construed as to exempt any boat, barge or water craft landing at said portion of the wharf from the payment of lawful wharfage, nor shall said lessee or its assigns ever 56 make any charge for landing at said wharf by boats, barges or other water craft having business there.

SEC. 3. The Wiggins Ferry Company is hereby authorized to construct, maintain and operate a single railroad track on the wharf from the south line of Lesperance street and for a distance of seven hundred and thirty-six feet and five inches from the north line of Lesperance street prolonged to connect with the incline track of the St. Louis, Iron Mountain & Southern Railway Company. The particular location of said track to be designated by the harbor and wharf commissioner. Said track shall be laid under the supervision and to the satisfaction of the harbor and wharf commissioner, and on the portion of wharf crossing Lesperance street, and said company shall pave the space between the rails of its tracks and for ten feet on each side thereof with granite blocks, and keep the same in good repair and condition with the same material and to the satis-

faction of the harbor and wharf commissioner; and on the portion of wharf north of the north line of Lesperance street prolonged, said company shall pave the space between the rails of its tracks and for one foot on each side thereof with the same material that the adjoining portion of the wharf is paved with, and keep the same in good repair and condition, and to the satisfaction of the harbor and wharf commissioner.

SEC. 4. For the privileges herein granted, the said Wiggins Ferry Company shall pay to the city of St. Louis the sum of $2,400 per annum, payable semi-annually in advance.

57 SEC. 5. Before availing itself of the privileges granted by this ordinance, said company shall file with the city register its acceptance of its provisions; and its penal bond in the sum of $5,000 with two or more securities, owners of unincumbered real estate in the city of St. Louis, to be approved by the mayor and council, conditioned that it will save the city of St. Louis harmless from any and all damages that may arise from the construction and operation of said branch track, and will faithfully comply with all the provisions of this ordinance or orders of the harbor and wharf commissioner in reference to said matter.

SEC. —. Nothing in this ordinance or in the lease hereby authorized to be made shall be so construed as to interfere with the privileges heretofore granted to the St. Louis Belt Railway Company under provisions of ordinance No. 12372.

Approved March 29, 1884.

Also a certified copy of plat No. 1, dated November 5th, 1861, on page 53, Miscellaneous Plats.

(Here insert the plat marked with lead pencil No. "2.")

(Here follows map marked p. 58.)

59 Counsel for the plaintiff objected to the plat on the ground that it is not properly certified. It seems to be a plat that accompanies the surveyor general's letter and the surveyors general's letter is not here and there is nothing to verify it as a true piece of evidence.

By the COURT: I think a plat that shows the certificate of the surveyor before it is received is competent.

Counsel for the plaintiff then and there duly excepted.

Counsel for the defendant also offered in evidence plats 24, 25, and 26, certified by Ribert McCollough, register of lands.

By Mr. BELL: This plat is open to the same objection and I object to its being received: it is not certified.

By the COURT: I think if a plat is certified by the surveyor general, so as to authorize it to be filed in the office of the register of lands, that that certificate becomes a part of the plat itself, so that a certified copy to be made evidence ought to contain the certifi-

cate of the surveyor. This is open to the same objection as the former plat.

By Mr. BELL: I will save an exception.

(Here insert plat "No. 3.")

(Here follows map marked p. 60.)

61 Counsel for the defendant next offered in evidence the deed of partition of Wilkenson and others, acknowledged on the 17th day of June, 1870, record- in Record Book 405, page 301.

By Mr. BELL: I object to this deed as having no relation to this case. This is a deed made by Mrs. Wilkinson and her husband and Mrs. Pim and her husband, in which they undertake to divide certain property. The deed does not include the property in this action, and I object to it because it does not embrace the property in this suit, and is therefore not pertinent to the suit, and I object to it secondly because the recitals of this deed do not operate as against Mrs. Pim, who was a married woman at the time.

The court overruled the objection; to which ruling of the court counsel for the plaintiff then and there duly excepted.

OFFICE OF THE RECORDER OF DEEDS, ST. LOUIS, MO.

Whereas Rita J. Wilkinson, wife of Thomas L. Wilkinson and Celestine Pim, wife of Louis F. Pim as heir and legal representatives of their deceased father Honore Picott, are entitled as tenants in common in fee to the real estate hereinafter set forth, and whereas for the purposes of making partition of the same between themselves in accordance with their respective interests, therein, they have had the same set off in two parcels which are supposed to be of equal value as near as may be, and which parcels are taken and agreed to be of equal value by the parties to the follow-

62 ing partition deed, the first parcel called and to be known for the purposes of this deed as "parcel No. one" embracing the following lots, pieces, or parcels of ground all in the county of St. Louis, and State of Missouri, to wit: 1st. A lot in block No. twenty-seven (27) of the city of St. Louis, fronting 62 feet more or less on the south line of Green street, by 37 feet deep; bounded north by Green street, west by a 20-ft. alley, east by line identical with east wall of three-story building fronting on Green street, and now leased to one Frank Hausemann, and south by a line parallel to and 42 feet south of the original north line of said block. 2nd. Lot three of Honore Picott's addition to said city of St. Louis, and in block 726 thereof containing a front of thirty-one feet, on the north line of N. Trudeau street, by one hundred and twenty feet in depth to an 18-foot alley; bounded north by said alley east by lot 4, south by N. Trudeau street. West by lot 2 of said block.

3rd. Lots, seven, eight, nine, ten, eleven and twelve in block five of Honore Picott's addition to St. Louis, being in block 725 of said

city containing together 163 feet on north line of N. Trudeau street by 128 feet deep to an 18-feet alley, bounded north by alley, east by Kosciusko street, south by N. Trudeau street and west by lot No. 6. 4th. The south half of block 724 in said city of St. Louis, containing one hundred and fifty $_{1}^{6}{}_{2}$ feet on the east line of Kosciusco street by a depth along N. Trudeau street of 420 feet, bounded west by Kosciusko street, south by N. Trudeau street, east by Main street, and north by the balance of said block. 5th. The north half of block 868 of said city of St. Louis, bounded east by the wharf west by
63 Main street, north by Picotte street, and south by the balance of the block. 6th. A lot in block 65 of the city of St. Louis, containing a front on the west line of Second street, of thirty-five 8 $7_{1}^{8}{}_{2}$ feet (35′ 8 $7_{1}^{8}{}_{2}$) by a depth of 99 $6_{1}^{2}{}_{2}$ feet more or less to an alley; bounded north by a line 137 $1_{1}^{2}{}_{2}$ feet, south of Washington avenue, in the front along 2nd street, and $130_{1}^{7}{}_{2}$ feet, south by Washington avenue in the rear along said alley east by Second street, south by lot now or late of Henry Shaw, & west by alley. 7th. Lots 28 and 29 on J. C. Cabanne's 2nd addition to St. Louis, said lots containing together 60 feet, on the southeast of the Gravois road, by a depth (to an alley) of 125 feet, and being in city block 1388. 8th. Lots 3 & 4 and the easternmost $3_{1}^{6}{}_{2}$ feet of lot 2, in city block 1829 and being block 3 of Darby's addition to Compton Hill, containing together a front of $53_{1}^{6}{}_{2}$ feet on the south line of Guilford street, by $132_{1}^{6}{}_{2}$ feet in depth, bounded east by lot 5 of said addition. North by Guilford street, west by line dividing lots 1, 2, 3 & 4 into equal east and west halves, said line running parallel with Lane avenue, and south by land of James S. Thomas *et al.* 9th. A parcel of land in St. Louis county aforesaid containing forty-six $_{1}^{13}{}_{0}{}_{0}$ acres, being lot one in subdivision of John Hempstead; estate in survey 387 in the name of John Long Jr. being partly in township 46 range 4, east and partly in township 46 range 5 east. The second parcel called and to be known for the purposes of this deed as "parcel No. 2" embracing the following lots, pieces or parcels of ground, all in said county of St. Louis. 1st a lot in block 182
64 of the city of St. Louis, containing a front of thirty-five $_{1}^{9}{}_{2}$ feet on the south line of Olive street by 100 feet more or less in depth, bounded north by Olive street, east by lot *once* of Thomas Houghan, south by lot of Ann L. Hunt, and west by lot formerly of Ann L. Hunt, being about $40_{1}^{6}{}_{2}$ feet, east by Eight- street. 2nd. A lot in city block 27 of St. Louis aforesaid fronting 37 feet on the west line of Main street, by a depth west along south line of Green street of 86 feet more or less to east wall of a block of 3-story buildings fronting on Green street, now leased to Frank Hausemann, west by said east wall which is east line of lot heretofore described in forst parcel and south by line parallel to and 42 feet south of original north line of said block; north by Green street, and east by Main street. 3rd. Lot 4 of Honore Picotte's addition to the city of St. Louis in block 726 thereof containing a front of 31 feet on N. line of N. Trudeau street, by 128 feet, in depth to *am* 18-foot alley; bounded north by alley. East by lot 5 south by N. Trudeau street, and west by lot 3 of said block. 4th. Lots one, two, three four, five and six

in block 5 of Honore Picott's addition to St. Louis, being block 725 of said city, containing together a front of 150 feet on N. Trudeau street, by 128 feet to an alley 18 feet wide; bounded east by lot 7 and west by De Kalb street. 5th. The north half of block 724 in said city containing 450 feet on Picotte street, by $150\frac{6}{12}$ feet on Kosciusko street, bounded east by Main street, south by southern half of said block. 6th. The south half of block 868 of said city of St. Louis, bounded east by the wharf. South by Trudeau street. West by Main street, and north by the northern half of said block.

65 7th. Lot 1 and the wester-most $28\frac{6}{12}$ feet of lot 2 of John F. Darby's addition to Compton Hill, in block 3 of said addition, and city block 1827 containing together a front of $53\frac{6}{12}$ feet on south line of Guilford street by $132\frac{6}{12}$ feet, bounded on the north by Guilford street, on the west by Lane avenue, on the south by lands of James S. Thomas and others, and on the east by line dividing lots one, two, three and four (1, 2, 3 and 4) of said Darby's addition into equal west and east halves, said line running parallel with Lane avenue; 8th. Lot No. 18 (number eighteen) in block 4 (four) of Papin's addition to St. Louis, being block 733 of said city fronting 31 feet on east line of Columbus street, by $146\frac{6}{12}$ feet to an alley, the south line of said lot being parallel with and sixty-two feet north of the north line of Duchouquette street. 9th. Lot No. 27 (number twenty-seven) in J. C. Cabanne's 2nd addition to the city of St. Louis being a subdivision of that part of block 22 of the St. Louis commons subdivided in survey 3077 said lot 30 (thirty) feet, on the southeast line of the Gravois road by depth of 125 feet (one hundred and twenty-five feet) to an alley and being in city block No. 1388. 10th. Lot No. 7 (seven) containing 20.92 acres in West Laclede by Bampert, being a subdivision of that part of U. S. survey No. 1930, which lies southeast of the Pacific railroad formerly belonging to the estate of Louis Bompart deceased; said subdivision was made and the land sold by the administrator of said Bompart deceased under order of the probate court of St. Louis county. 11th. Lot No. 7 containing 5.51 acres in West Laclede by Marshall, being subdivision made by James C. Marshall of

66 fractional section- 27, 28 and twenty-nine in township 45, north of range 6 east, lying between U. S. surveys 1930 and 1953.

Now therefore this deed of partition made and entered into this sixteenth day of June A. D. 1870 by and between said Louis T. Pim and Celestine his wife, and the said Thomas L. Wilkinson and Rita J. his wife. Witnesseth: That the said Thomas L. Wilkinson and Rita J. his wife in consideration of the premises and that the said Louis T. Pim and Celestine his wife convey to said Rita J. Wilkinson the first parcel of land hereinbefore called "parcel No. one" do by these presents grant, bargain and sell, convey and confirm to the said Celestine Pim, and to her heirs the several lots, pieces or parcels of land hereinbefore described and included in "parcel No. two."

To have and to hold, to her the said Celestine Pim and to her heirs in severalty forever, and the said Louis T. Pim and Celestine

his wife in consideration of the premises and that the said Wilkinson and wife, convey to said Celestine Pim the parcel of land hereinbefore designated a- " parcel No. two " do by these presents, grant, bargain and sell, convey and confirm to the said Rita J. Wilkinson, and to her heirs the several lots, pieces or parcels of land hereinbefore described and included in said " parcel no one " To have and to hold to her the said Reta J. Wilkinson, and to her heirs in severalty forever.

In witness whereof, the said parties have to these presents set their hands and seals the day and date last aforesaid.

—— ——. [SEAL.]
THOMAS L. WILKINSON. [SEAL.]
67 RITA J. WILKINSON. [SEAL.]
LOUIS T. PIM. [SEAL.]
CELESTINE PIM. [SEAL.]

STATE OF MISSOURI, } ss :
County of St. Louis, }

Be it remembered that on this the seventeenth day of June, A. D. eighteen hundred and seventy, before me, the undersigned, a notary public within and for the county of St. Louis aforesaid, cames Thomas L. Wilkinson and Rita J. Wilkinson and Louis T. Pim and Celestine Pim, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and they then and there acknowledged the same to be their act and deed for the purposes therein mentioned, and they, the said Rita J. Wilkinson, wife of the said Thomas L. Wilkinson, and the said Celestine Pim, wife of the said Louis T. Pim, being by me first made acquainted with the contents of said instrument of writing, acknowledged, on an examination separate and apart from their respective husbands, that they executed the same freely, voluntarily, and without compulsion or undue influence of their said husbands.

In testimony whereof I have hereunto set my official signature and affixed my notarial seal, at office, in St. Louis county
[SEAL.] and State aforesaid, this the day and year last above written.

SAMUEL SEMPLE,
68 *Notary Public in and for St. Louis County, Mo.*

Filed and recorded July 11, 1870.

JULIUS CONRAD, *Recorder.*

STATE OF MISSOURI, } ss :
City of St. Louis, }

OFFICE OF RECORDER OF DEEDS.

I, the undersigned, recorder of deeds, certify that the foregoing is a true copy of an instrument in writing executed by Rita J. Wilkinson *et al.* (partition), together with the acknowledgment and date of filing and recording thereof, as fully as the same remains of record in my office in Book 405, page 301.

Witness my hand and official seal this 24th day of Feb'y,
[SEAL.] 1880.

C. W. IRWIN, *Recorder.*

Counsel for the defendant- also offered in evidence a plat which was identified by the plaintiff's witnesses, showing the location of the river bank.

(Here insert plat marked "No. 4.")

(Here follows map marked p. 69.)

70 *Testimony of* Captain THOMAS P. MORSE, a witness called on behalf of the defendant-, being duly sworn, testified as follows:

Direct examination by WILLIAM C. MARSHALL, Esq.:

Q. State your full name.
A. Thomas P. Morse.
Q. Your age.
A. Forty-five and a half years—past forty-five—not quite a half.
Q. What is your business, Captain?
A. Secretary and treasurer and manager of the St. Louis Sectional Dock Company.
Q. How long have you been connected with the Sectional Dock Company?
A. Well, since I came to St. Louis—thirty-seven years ago—in one way or another. Not in my present capacity, though. For the last sixteen or seventeen years I have been holding this position.
Q. I believe your company was originally called the Sectional Dock Company and afterwards the St. Louis Sectional Dock Co.?
A. Yes, sir.
Q. Do you know this property in front of block 868, between what would be Russell Ave. if it ran through eastwardly to the river and Trudeau street if that ran through eastwardly to the river?
A. Yes, sir.
71 Q. How long have you known that property?
A. I have known it intimately since 1858.
Q. Do you remember what time in 1858?
A. I think about June or July. I do not remember the month, but I think it was in that period.
Q. From June or July, 1858, up to the present time?
A. Yes, sir.
Q. How often have you seen the property during that time?
A. Well, with the exception of the years from 1869 to 1873, I think I saw it every day.
Q. What was the occasion of your seeing it every day?
A. Well, I lived over near it and went to school, and I always visited the dock. My weakness was running off when I was a boy going to school.
Q. Where did you live at that time?

A. On the corner of Barton and Kosciusko streets.

Q. How far from the river?

A. Where the river is now about two blocks.

Q. Along where the river was then?

A. Yes; according to what you call the river then. There was a dock on Barton street that ran out into the river. If you take from the end of the block it was two blocks, but if you take from the water it was about a block and a half.

Q. North or south of Russell Ave.?

A. Barton street is about—well, four or five blocks, say.

Q. That was south, was it?

A. That was south of Russell or what was then Picotte street.

72 Q. What was then called Picotte street is now called Russell avenue?

A. Yes; that is now called Russell avenue clear through to the river.

Q. Where was the water line when you first -new that property there?

A. It was along the Barton-street dock.

Q. From there down between what is now Russell avenue and Trudeau street where was the water line?

A. It is according to the stage of the water.

Q. Well, state it at several stages.

A. When I first went down there?

Q. Yes; in July, 1858.

A. When I first went down there, in 1858, there was awhile that they ran the Lesperance-street dock. The water was in the slough around the dock. The mouth of the *slew* was so that you could walk across it; you could not go across it with a team; after that time it filled up.

Q. Where was that bar that you speak of?

A. At the lower end of Duncan's island, just below Lesperance street; it ran down where Picotte street is and from there the bar disappeared; of course, as the river fell, there was more of the bar that would show above the water. By the time you got down to Barton street there was always water in there, even at a low stage of water, along from 1858 to 1861.

Q. Now, you say Duncan's island was then where?

A. The lower end of Duncan's island was immediately under the shore opposite Lesperance street.

73 Q. Do you say there was a dyke running out from Lesperance street?

A. Yes, sir.

Q. Did that extend all the way across to the island?

A. Yes; and across the island into the river.

Q. East of the island?

A. East of the island; yes, sir.

Q. Now, farther north than Lesperance street, was there any water between Duncan's island and the land?

A. Yes; up until ten or twelve years ago.

Q. Up until ten or twelve years ago?

A. Yes; I think so; I do not remember the exact time; it has all been filled up with the Iron Mountin*g* road.

Q. Where was the upper end of Duncan's island, Captain, when you went down there in 1858?

A. I could not tell you where that was because there was a series of dykes running out, built by the city, that reached out to Duncan's island and crossed it, and the water remained around there for years before they were able to fill it up, and it was not filled up until the Iron Mountain railroad and the St. Louis Wooden Gutter Company and such institutions as that filled it up; I don't know where the upper end was at that time; in fact, I never saw it when it was completely an island; I seen it about twice, at least, afterwards.

By Mr. BELL:

74 Q. I understood you to say when you first saw Duncan's island the dykes were in existence running from the mainland through and across the island out into the water beyond?

A. There was a time that Cho-teau avenue, I believe, was ahead of the island.

Q. These streets go from north to south; the first was Choteau avenue?

A. Yes; but it was not Chouteau avenue then; then came Miller street, and then Lesperance street, and then Bocton street.

Q. Now, when you first saw the condition of things down there in 1858 all these dykes were in existence?

A. Yes, sir.

Q. Running from the mainland there across Duncan's island into the water?

A. Yes, sir.

Q. You never saw Duncan's island before that time?

A. No, sir.

Q. You never saw Duncan's island at any time when these dykes were not there, connecting it with the main shore?

A. No, sir.

(Counsel for the defendant shows the plat to the witness.)

By Mr. BELL: I object to this plat being exhibited to the witness for the reason that your honor has excluded — as evidence in this case, and the witness never saw the property at the time mentioned by this plat.

By the COURT: I think it is competent to show the map to the witness.

By Mr. MARSHALL: I show you a plat and ask you whether you
75 can state to the jury from your recollections of the surroundings and condition of the country there if that drawing correctly represents the location of Duncan's island and what you call the slough and the main shore at the time you knew the property there.

By Mr. BELL: I would like to have the witness informed at what date that plat was made.

By the COURT: I will overrule the objection.

A. I have no recollection of the river or island in that shape.

By Mr. BELL: I object to this plat on the ground that it is another rejected plat.

By the COURT: There will be the same ruling on that question as before.

By Mr. BELL: I will save an exception.

By the WITNESS: I do not remember of seeing it in this shape, sir.

By Mr. BELL:

Q. You do not remember of it appearing in that shape?

A. No, sir; it is hardly ever so low.

By Mr. MARSHALL:

Q. I show you another plat and ask if you can state whether that show- the location and position of Duncan's island as it existed in 1858.

Same objection, ruling, and exception.

A. No, sir; in 1858 there wasn't anything like that.

Q. Now, I show you another drawing and ask you if you can state whether this drawing shows the location of the property at any time that you have known the property; and, if so, when.

A. Yes, sir.

Q. Now, at what time does that show the location of the
76 property?

A. I cannot give you the date, sir, but I think it was from somewhere of 1884 to 1885.

Q. Until what time?

A. Up until two years ago or two years and a half ago.

Q. Who was in possession of that property at the time that you say this plat represents its condition?

Objected to. Objection sustained.

By Mr. MARSHALL:

Q. Who built the buildings that are represented on that plat on that property?

A. There are several blocks here. Which do you want?

Q. Take block 868.

A. Our company did—the Sectional Dock Company.

Q. When did you put them there?

A. Along about—I don't know. I could tell by my books exactly.

Q. Well, about when?

A. It was about 1878; there was one building which is marked here "workshop" which was not a workshop; it was a saw-mill that was put there in 1864.

Q. By whom was it put there?

A. By our company—by the St. Louis Sectional Dock Company.

Q. Did the St. Louis Sectional Dock Co. make any improvements

or put any sheds or buildings on that property when they first went down there in 1858?

77 A. Yes; but not on this property; this is partly on block 868.

Q. What did they put up then?

A. It was not on block 868. When?

—. ——?

A. It was above Picotte street, where they were building at the time, up to 1864.

Q. South of Lesperance street?

A. Yes; from Lesperance to Picotte, north of Russell Ave. now.

Q. You used this block then from Lesperance street to where?

A. Down to Picotte street; that is all we could use.

By Mr. BELL:

Q. It is Russell Ave. now?

A. Yes; Russell avenue now.

By Mr. MARSHALL:

Q. You used it from 1858 to what time?

A. To 1864.

Q. Then what did you use?

A. Then I got additional ground by buying this saw-mill south and partly in front of block 868.

Q. Before that time what was the condition of that ground from 1858 to 1864, that is now in front of block 868?

A. Well, it was very low even in an ordinary stage of water; it would overflow so that you could not use it for business purposes until after it had filled up from improvements and things we put there to raise the ground there.

Q. What did you put there?

A. Cribs and such things as that for the purpose of getting their lumber above water.

78 Q. What did you use the property for outside of the buildings?

A. We used the property for the storing of our lumber used in our business for building and repairing steamboats.

Q. Was that the business of your company?

A. Yes, sir.

Q. Was that the place of business of your company?

A. Yes, sir; the docks.

Q. You built cribs, you say?

A. We built cribs to put the lumber on.

Q. Tell the jury what sort of things they were.

A. We put the logs on end and put heavy stringers or timbers across them and piled our lumber on them.

Q. What was between these cribs?

A. They were building them that way for the purpose of allowing the river, when it did rise, to sweep through there, and it left a deposit and built up the ground so that we could leave the crib

there and have it to pile lumber on, and it made ground that we could not use except in extraordinary high water.

Q. How many of such cribs did your company put up there?

A. I don't know, but I presume when we first went down there we had as high as fifteen or twenty of them with roadways between them.

Q. Was there a roadway along the river bank at that time south of Lesperance street?

A. No, sir.

Q. Was there a pathway of any sort?

79 A. Only in extremely low water.

Q. Only in extremely low water?

A. Yes; and then you could not get across without getting your feet wet.

Q. No, no; I mean running along the west bank of what you call the slough. Was there any passageway or roadway there?

A. Kosciusko street was the nearest one; closer to the water's edge along down to the company's building.

Q. (Interrupting.) Was there any roadway down there close to the water's edge?

A. No, sir. The repairing was done down at Lesperance street, and roadways were made onto our own ground.

Q. That was the condition of affairs from 1858 to 1864?

A. Yes, sir.

Q. That portion that was on block 868 was then water?

A. Sir?

By Mr. BELL: He has said it, and I object to the witness being led in that way.

By the WITNESS: I said that part down there nearest to Barton street was the lower end of a pier extending south from Duncan's island, or near the south end of Duncan's island.

Q. Now, how far south did the lower end of Duncan's island extend in 1858?

A. Just according to the stage of the river.

Q. Take it in high water—how far did it extend in high water?

A. It did not extend hardly any distance at all. It can run off. The ground can slope from Lesperance street right straight down.

80 Q. In high water was there any land showing above it?

A. In high water the only ground there that would be out of water would be where our place is located, which was the highest point of ground, and that was seventy-five feet south of Lesperance street.

Q. In what direction was that from Kosciusko street?

A. It was directly east; Kosciusko street runs north and south.

Q. The office of your company was on Duncan's island?

A. Yes; the lower part of what was Duncan's island.

Q. That was seventy-five feet south of Lesperance street?

A. Not to exceed that.

Q. Now, what was there opposite of what is now Russell Ave., or the block that lies between Russell Ave. and Trudeau street?

A. The lower point of the island ran off in that direction, and sometimes there was water there and sometimes there was marshy ground and that sort of stuff; it was the same as is to be found in all sloughs.

Q. When was the dyke built across at Barton street?

A. I don't know. It was built across when I went down, and it was afterwards built higher. I cannot remember those dates, sir.

Q. When was the dyke built across Lesperance street?

A. I do not know, sir. The dyke was there when I went down in 1858; that was raised afterwards, because the high water often overflowed that dyke.

Q. South of the Lesperance-street dyke, was there any water between Duncan's island and the shore?

A. Yes, sir.

Q. What was the width of that?

81 A. At different stages of the river it would run from 100 feet in width and in some cases probably more.

Q. How deep did it get in high water?

A. It was according to how high the water was. I have seen twenty feet of water in there.

Q. How deep was the water in that channel in ordinary stages of water?

A. It was then in the shape of a slough more than anything else, excepting the southern outlet just north of Barton street. There was a low place in there and the dock company stopped it by filling it up; there was a passageway out in through there; the water remained in there at Lesperance street from that time until the Iron Mountain railroad filled it up a few years ago.

Q. Do you remember when the Iron Mountain road filled it up?

A. I think they began to fill it in in 1882 or 1883, and they have been filling continually ever since.

Q. (Showing a plat to the witness.) Take this plat. Do you know the location of Columbus street?

A. Yes, sir.

Q. That first street is now called Main street?

A. Yes, where Main street is now; it was out in the slough.

Q. Take this plat made by Mr. Dziatzko, marked Main street. Now, will you tell the jury how far and where that slough that you speak of was located from this point (indicating)? You see the names of the streets there?

A. Well, the slough where Main street is located on this map in 1858. Main street as far as it is shown on this map was en-

82 tirely in the slough.

Q. What was the street nearest to the river at that time?

A. Kosciusko street.

Q. Will you point out to the jury how that was located?

A. This is Kosciusko street, this is Main street, and this is Barton street. There was a candy factory here and the slough was in back

of the candy factory. It ran out here and came out in this shape, and the slough extended south of Barton street and to Anna street.

Q. Now, coming north, describe how it was north of that.

A. The slough came down here and *and* Barton street came in back of Lynch's property. Mr. Lynch used to live right in here (indicating). Lynch's property came right in at this point, and here is where he lived, right on this corner here. Mr. Lynch's property was in there, right immediately back of this place (indicating). I came down here to a corner where there was a stone house south of Russell avenue. You could not get out to the island without going over the dyke.

Q. It was in that condition when you went there?

A. Yes; in 1858.

Q. When you went there in 1858 was there in block 868 any railroad tracks in existence there at that time as marked in this map?

A. In block 867 there was some there below that, but there was hardly any on this part of the river front that was not covered with water constantly.

Q. There was Duncan's island, with reference to that?

A. It came to a point at Main street and the south end came in here this way (indicating). Here is Barton street, and here is where it is low, and in times of high water the river always got in there and backed up here and kept water in the slough all the time.

83 Q. You say there was a dyke at Barton street?

A. Yes.

Q. This part of Barton-street front is called block 868 on this plat, and that was all water or a slough?

A. Not all the time; no. I say almost all the time there was water there. There was always water in the slough.

Q. Did that extend westwardly?

A. The water was deeper as you got towards the shore side. I don't see where Main street is located on that map. Oh, it is here. Where Main street is located on that map there was always from four to five feet of water in there.

Q. Was there any relation between Duncan's island and what was then the shore, or what was west of what is shown as Main street on this map?

A. From 1858 to 1863 you could not tell Barton street, because between Barton street and Lespeeance street they had a boat, unless it was in extremely low water.

Q. In extremely low water how was it?

A. In those years we would get our feet wet when we went down Barton street where this low place was.

Q. You say the slough was from 150 to 200 feet wide?

A. Yes; and in some places it was wider.

Q. Immediately east of the slough what was there?

A. There was rock banks and quarries. The bank of the river ran along there, and along here by Lesperance street the bank of the river was clearly defined. This ran along here almost to Kosciusko street; this ran along here until it came pretty nearly in

front of Kosciusko street and went pretty near down to De Kalb street.

Q. North of here?

A. Yes, sir.

84 Q. Point out on this map where you say the lower end of Duncan's island was at that time.

—. The lower end of Duncan's island that you might count upon at any time up to a medium stage of water was down about the upper end of these lines.

Q. How far north of Russell avenue?

A. It was about at Russell avenue.

Q. The lower end of Duncan's island, then, was just at the north line of Russell avenue?

A. Yes; but there was a creek that ran out through the slough and ran into the river right at that place—right where Russell avenue is now.

Q. Do you remember the spring east of the property there?

A. There was a spring behind *of* the old stone house there that always fed that *g*uarry, and what was overflowed therefrom flowed through this creek. There were springs in all of those quarries. The *g*uarries upon Lynch's place had springs in them. They were all in the same fix.

Q. You say from 1858 to 1863 your company occupied the portion of that property that would be in front of block 867, on this plat?

A. Yes, sir.

Q. That is between Lesperance and Russell avenue?

A. Yes, sir.

Q. And after 1863 your company then occupied still more ground?

A. We got enough ground, I think, to give us 1,200 and some odd feet sou*g*h of Lesperance street.

Q. Did that take you below Trudeau street?

A. Oh, yes, yes.

Q. Down close to Barton street?

85 A. No; it took us down to about where Lynch's property was.

Q. How long did your company *to* occupy that 1,200 feet south?

A. We occupied that up until 1884 or 1885, I think.

Q. Then what did you get?

A. Then we made a new lease with the city and had a new ordinance pas*t*, and we surrendered from 400 and odd feet south. We leased 1,000 feet from the line where Russell avenue is now. The ordinance will show that—1,000 feet south.

Q. Fronting Russell avenue south?

A. Yes, sir.

Q. How long did you remain in possession of that?

A. We are in possession of that today, and will be until 1900.

By Mr. BELL: I object to the answer and the question.

By Mr. MARSHALL:

Q. How long has your company been there on that property?
A. We have had all the property in all of these blocks since 1863 or 1864 up until now and have got it yet.
Q. And your lease will be out in 1900?

By Mr. BELL:

Q. What do you mean by having it today?
A. We have a contract or lease from the city of St. Louis giving us the right to use that property until 1900.
Q. Are you using it at all?
A. Yes, sir.
Q. I thought you were doing business in Carondelet?
A. We have some blacksmith shop- on that property.

By Mr. MARSHALL:

Q. Now, from 1858 up to the present time what has your company put on that property?
A. We had at Lesperance street after 1863 1,200 feet, and after 1884 1,000 feet from about Russell avenue south.
Q. What use had your company put that property to?
86 A. We have used it in our business for the docking and repairing of vessels and the building of vessels up to within two years and a half. We are now doing all our work in Carondelet. We are now leasing—rather renting—subject to the approval of the city officers, a portion of the grounds of the Wiggins Ferry Company for switching purposes; we have the entire original front, and it gives us facility there for our blacksmith shop, and our docks are so arranged that we do our floating work there—that is, repairing business that does not have to be done on the docks.
Q. Have you used any portion of that property other than the part that was covered by the buildings during all those years?
A. Certainly; we have used it all.
Q. What use did you make of it?
A. We used it in our business; we had to have it.
Q. Tell the jury what you did with it.
A. We had stables, an office, blacksmith shops, and a lumber yard.
Q. Did you use the whole of it?
A. Certainly we did; we had to use it.
Q. Now, as to the extent of your occupancy and your right there, did you use the whole of that 1,200?
A. We used the whole of it.

Mr. BELL: We object to those leading questions; let the witness state what he used.
By the COURT: Let him answer the question.

By Mr. MARSHALL:

Q. Has any one else used the property on this block 868, between Russell and Trudeau street?

A. Yes; within the last two years.
87 Q. Who?
A. The Wiggins Ferry Company used a part of it.
Q. Any one else?
A. No, sir; no one else except us.
Q. Do you know of any tracks being laid on that property?
A. Yes, sir.
Q. When?
A. Within the last two years.
Q. By whom?
A. By the Wiggins Ferry Company.
Q. How many?
A. I do not know; I think there is six.
Q. Do you know if the St. Louis Transfer Company put any tracks there?
A. There tracks, I think, are on Front street. We don't know the transfer company with us at all; they are on Front street; they have a right over the street to put two tracks there on Front street and they have two tracks west of these tracks.
Q. You state now that Main street in 1858 was the center of the slough?
A. No; I did not say that; it was out into the slough from Lesperance street south. If you went from Lesperance street north it put the east side of the slough on the west side of Duncan's island. The Iron Mountain railway in 1858 and 1859 ran trains across there. The Iron Mountain railway used to stop at Lanie street, the first street north of Barton street and two or three streets south of Trudeau. There is where they used to stop; then they built a trestle-work running across from Anne street up what is now Main street and across these slough ponds. On the south side of Lesperance they were on the east side of the slough pond; on the north side
88 of Lesperance street they were on the east side of the slough ponds, because the river took a great bend there; Lesperance street was the old bank of the river and these sloughs were widest there.
Q. Now, south of Lesperance street, how long did this trestle-work remain there?
A. Until a few years ago, when they filled it up. It has not been very long ago.
Q. Who did the filling?
A. The Iron Mountain railroad.
Q. Do you mean to say they hauled dirt there and to fill it?
A. Yes, sir.
Q. Do you know of any work being done by the city immediately north of Russell avenue and south of Russell avenue in 1858 to prevent the caving in or washing away of the ground there?
A. They never did anything—the city never did anything for us. We had to do it all ourselves, except on two occasions, when the city drove a lot of piles in where an eddy was forming in front of Lesperance street; the whole place was in danger of tumbling into the river.

Q. Where were your blacksmith shops located at the time?
A. On Lesperance street.
Q. South or north of the line?
A. Right on it.
Q. Where was this danger?
A. Below it.
Q. South of it?
A. Yes, sir.
Q. That would have been in what block?
A. In block 867.
Q. What did the city do then?
A. They came down there and drove a lot of piling in to
89 prevent the caving of the ground and stopped it.
Q. Will you make a mark on the plat showing about where that piling was driven? Mark it with a pencil.
A. Shall I mark it here with a pencil?
Q. Yes; if you please.
(The witness marks on the plat with a pencil.)

A. This line here shows the piles and the other shows the bank where it was cut in. Here is about the end of the dock here; the bank came in with a little curve here; it cut away in here to our blacksmith shop, which was located here. This was an old duck pond down here. This place was caving in so that our place was in danger of falling into the river; the city came down there and drove a lot of piles in here to prevent the caving; it drove a long row of piles straight up the river this way, and put brust inside to protect it; that is the only work the city ever done with the exception of two wagon-loads of rock.
Q. What did you do?
A. We done everything to fill the place up, to get it so we could stay there. It was the only place we had along the river front where we could operate our works and do our business. By the use of cribs we filled up the slough and raised the gauge so that on accasion we could made use of the place.
Q. Did you build it all up?
A. Yes; we had to do it. We built our saw-mills along the bank there, and we got some additional ground, 125 feet, from Lesperance street, and we made those improvements upon it and put our saw-mill there. We hauled dirt in there and filled up eight or ten feet and put different material on it.
Q. Where was the mill located?
A. In front of this property; Trudeau street runs right down into the mill.
90 Q. The mill was located between Trudeau and Russell?
A. The lower end of it. Trudeau street cuts the lower end of it off. The sewer that comes down Trudeau street runs in where the saw-mill was. The greater portion of the mill was above that, in front of this block 868.
Q. You filled that up yourselves?
A. Certainly we did.

Q. Was that done frequently?
A. Yes, sir.
Q. What became of that Duncan's Island crib?
A. It is down there yet.
Q. Where?
A. Under about fifteen or twenty feet of dirt that is on top of it now.
Q. Who put the dirt there?
A. The different lessees from the city and the purchaser of the property—the Iron Mountain railway.
Q. Did the river fill it up any?
A. The river filled up a great deal. There is no doubt about that. Every high water it filled it up.
Q. What became of that slough?
A. The Iron Mountain railroad filled it up.
Q. Is the track of the Iron Mountain Railroad Company in the same place it was when they erected the trestle-work?
A. Yes; it runs right over the same old trestle, and you can go down there and find the piles there today.
Q. Now, all this time from 1858 down to this day, has your company been paying rent to the city of St. Louis for that property?
A. No, sir.
91 Q. When did you commence paying rent?
A. We commence- paying rent in 1866 or 1867. We were located formerly at the foot of Mulberry street. The city now extends the wharf down there. We don't want to leave. They said to us if we could go below Lesperance street—any place—we might have any dock room we might select below Lesperance street; that they would give us all the grounds we needed for ten years for nothing. There was a contract, I think, entered into, but the city did not keep it, and they began to charge us rent three years too soon.
Q. You went there in 1858 under that arrangement?
A. Yes; we built Lesperance street in 1858.
Q. Designate the place.
A. Right there (indicating).
Q. That was the arrangement made with the city?
A. Yes, sir.
Q. Since 1863, and that was three years too soon; but since about 1865 has your company been paying rent right along?
A. Yes; right along.
Q. During that time has anybody else claimed to own the property or make any demand upon you for the possession of this property?
A. No, sir.
Q. Or made any demand upon you for the rents of the property?
A. No, sir.
Q. Have you ever heard of any claim being asserted by Mrs. Pim or her husband or her mother or Miss Picotte or her father or anybody else for this property that you have occupied?
A. No demand has ever been made.

Q. Did they ever serve any notice on you?

92 A. No, sir; the only legal notices were about the suits in court.

Q. Prior to the institution of this suit was any demand ever made upon you for the possession of this property by Mrs. Pim?

A. No, sir.

Cross-examination by LEVERETT BELL, Esq.:

Q. Suits have been brought against the dock company, have they not, Captain?

A. Yes, sir.

Q. Some years ago Mrs. Moss brought suit, did she not?

A. I don't remember it.

Q. Some years ago Mrs. Wilkinson brought suit?

A. Mrs. Wilkinson did; yes, sir.

Q. You do not pretend that you have not been acquainted with the fact of these outstanding claims on this property in the Moss family and Pisotte family and others, do you?

A. I don't know who the families were. I knew or had heard for some time that the heirs of the property in the old record book were going to try to reclaim and get possession of the ground if they could.

Q. Now, Captain, you went there in 1858, did you not?

A. Yes, sir.

Q. How were the docks located then on that piece of ground known in that vicinity as Duncan's island? Were they situated on Duncan's island?

A. Yes, sir.

Q. Now, that piece of ground in 1858 was only an island in name, was it? That piece of ground in 1858 on which your docks were situated was connected to the main shore by the Barton-street piling and the Lesperance-street dyke by the Lesperance-

93 street piling and the Cho-teau-avenue dyke, was it not?

A. The Barton-street dyke was below that turn; the other dykes ran to the island and across it.

Q. At the time when you went to locate on this piece of land which was near Duncan's island—this so-called Duncan's island was connected to the main shore by the four dykes I have named?

A. No; I do not know where the upper end was. I do not think the upper end of the island went above Hazel street; there was only three dykes there.

Q. Wasn't there a dyke at Hazel street?

A. That is what I am talking about.

Q. Wasn't there a dyke at Lesperance street?

A. Yes, sir; there was a dyke at Lesperance street?

Q. And at Barton street?

A. That was below the island.

Q. Did it not run across the island?

A. There was the island, I know, but I think it ran out into the river.

Q. At this time, in 1858, do you know that Duncan's island was certainly connected with the main shore by three dykes?

A. I think so; yes, sir.

Q. These dykes to the south and below the slough went to the east side of what was called Duncan's island and projected eastwardly into the river?

A. Yes, sir.

Q. No steamboats could navigate this slough between the main shore and the so-called Duncan's island?

A. No, sir.

Q. You never knew this property at any time to be in a condition so that a steamboat could go through there, did you?

A. No, sir.

94 Q. And all the time since you have known it there has been an island in name, but not an island in fact, assuming that the definition of an island is that it is land surrounded by the navigable water of the river. Answer that question, will you?

A. No; there has been no island, in the way in which you state it.

Q. Only by name?

A. Yes, sir.

Q. As an independent fact you have never known Duncan's island when it was surrounded by navigable water?

A. No, sir; I have never known it when it was surrounded entirely by water.

Q. You have known it in stages of exceedingly high water?

A. Yes; and low water too.

Q. At all times, either at high or low water, these dykes have existed there?

A. Yes; as long as I have known it.

Q. Now, when extremely high water came in the water was high enough to cover these dykes, was it not?

A. Only on one or two occasions that I remember.

Q. In one or two instances?

A. In two instances; yes, sir.

Q. Give the name of those years.

A. In 1858.

Q. That is when you went there?

A. Yes; that was the year that I went there; it was before I went down there, and in 1858 and 1877 or 1878.

Q. That is twice?

A. There was only two instances that I remember that the water went up over the dyke; if the dyke has as low—that is, the Lesperance-street dyke had been as low as the dykes were in

95 1858 there would have been several houses that the water would have gone over.

Q. You never knew of but these two instances when the dykes were overflowed?

A. No; one in 1877 or 1878 and the other in 1858.

Q. When you went there in 1858 you were given a location at the foot of Lesperance street, were you?

A. Yes, sir.

Q. Do you remember of seeing a dyke at the eastern end of Lesperance street?

A. No, sir; there was no dyke there then.

Q. The dyke started where?

A. The dyke was clear north of what is Lesperance street now; our buildings were on what is now Lesperance street according to this plat.

Q. Were you building them as shown in this plat?

A. These buildings were not there at all then as they are now.

Q. Here is Lesperance street?

A. Yes, sir.

Q. And here is block 867 and this is black 868; now, as I understand it, you settled here (indicating)?

A. Yes, sir; right in here.

Q. Now, what I want to get at is you never occupied any part of block 867?

A. No part or any part of the line west of the west line of the wharf.

Q. When you got down here afterwards in 1864, you never occupied any part of block 868?

A. No, sir.

96 Q. You occupied ground to the east of it?

A. To the east of the west line of the wharf, always.

Q. In 1858, I want you to tell the jury whether there was any ground east of block 867 in existence.

A. Yes; there was.

Q. And you occupied that ground?

A. Yes, sir.

Q. And at that date there was also ground in front of block 868?

A. That was at a medium or low stage of water.

Q. Subsequently, in 1864, you commenced occupying ground in front of block 868?

A. Yes; we built this mill there then. We built up ten or twelve feet of earth that we hauled in with the cars. There was a creek came down through here. We bridged that over and hauled dirt there and filled that up and built our mill there. We afterwards built our docks there.

Q. You went down there in 1865?

A. Where?

Q. Down here in front of block 868.

A. We had this mill down there in 1864, but we did not move these buildings down there until 1878.

Q. In 1864, when you put your mill there, was it standing on dry ground?

A. Certainly it was. We filled it up.

Q. When did you put that there?

A. In 1878.

Q. Then it was dry ground, was it?

A. Certainly.

Q. When did you commence piling your lumber in front of block 868? What year did you first put lumber piles there?

97 A. We put some lumber there during the war. It was only on cribs. We used to bring barges up this creek and unload some on one side and some on the other side until we bridged it over here. We never put much lumber to the south of these tracks here at all, because we kept this place for other purposes.

Q. When did you first put lumber onto the grounds in front of block 868?

A. We began putting lumber there, I think, after we had built our cribs there and filled it up with dirt.

Q. I don't care about the months, but I am trying to get at the year.

A. It was from 1858 up, then.

Q. In 1858 did you have lumber in front of block 868?

A. Yes, sir.

Q. Was there dry ground there in 1858?

A. No; that was the lower part of the bar. That is what I have been trying to tell you all the time. The lower ground reached off down this way and we built cribs on it.

Q. Did the cribs rest on dry ground?

A. Yes; they did.

Q. That was in 1858?

A. Yes.

Q. Them in 1858 there was dry ground in front of block 868?

A. Yes, sir; certainly.

Q. And there has always been from that date?

A. Yes, sir.

Q. In the meantime it had become filled up more and more?

A. Yes, sir.

Q. Until now the whole country is completely filled up?

98 A. Yes, sir.

Q. A man going down there today would not see any indication of what was called Duncan's island, although he might be standing where the original island was located?

A. A man going down there today who knew it then would not know where he was.

Q. It has all been absorbed into the main shore?

A. Yes, sir.

Q. Now, Captain, did not these dykes that went out there as you state, by stopping the current between the so-called Duncan's island and the Missouri shore, operate to fill up these sloughs?

A. That is what they were built for.

Q. Did they operate in that way?

A. Yes, they did; of course.

Q. Your company did a great deal of filling along there?

A. Yes, sir.

Q. You did that yourself for obtaining more conveniences?

A. Yes, sir.

Q. The Iron Mountain Railway Company came along with their tracks and built this trestle-work and filled it up with dirt?
A. Yes, sir.
Q. By these various methods it has all become solid ground down to the water's edge?
A. Yes, sir.
Q. And Duncan's island by these processes has disappeared from the face of the earth?
A. Yes, sir.

Testimony of HENRY ADKINS, a witness called on behalf of the defendant-, being duly sworn, testified as follows:

Direct examination by WILLIAM C. MARSHALL, Esq.:

99 Q. State your name in full.
A. Henry Adkins.
Q. What is your occupation?
A. I am superintendent of the St. Louis Sectional Dock Company.
Q. How long have you been connected with the Sectional Dock Company?
A. I have been connected with the Sectional Dock Company three different times.
Q. Beginning when?
A. Beginning in 1856.
Q. Then you remained with them how long?
A. I remained with them about eight or nine years.
Q. Then you were away how long?
A. I was away about four years.
Q. Then the second time you were connected with them how long did you remain with the company?
A. About six or seven years.
Q. Then you were away again?
A. Yes, sir.
Q. How long?
A. I don't know as I can recollect exactly. I have been with them this last time about five years.
Q. Where were the works of the Sectional Dock Company located at the time you first became connected with the company?
A. About at the foot of Chauteau avenue.
Q. Do you know when the docks moved down to Lesperance street?
A. About 1858, I believe, or 1859; along there some place.
Q. Were you with the company then?
A. Yes, sir.
100 Q. Do you know Duncan's island, Captain?
A. Yes, sir.
Q. How long have you known that?
A. I have known that nearly ever since I have been in St. Louis.
Q. When did you come to St. Louis?
A. The first time I came to St. Louis was about 1845 or 1846.

Q. Did you come up the river when you came to St. Louis?
A. Yes, sir.
Q. You have known Duncan's island since 1845 or 1846?
A. Yes, sir.
Q. Where was the lower end of Duncan's island when you first knew it?
A. I don't know as I can locate it exactly. I think the lower end of Duncan's island was somewhere between Miller and Lesperance streets.
Q. Now, what was there between Duncan's island and the west shore next to the city?
A. At what time do you mean?
Q. When you first knew it, in 1845.
A. There was in good, high water a channel or river running right up through there, and boats ran between the main shore and Duncan's island.
Q. At what stage of water?
A. In a medium stage of water.
Q. The channel was where?
A. Running between Duncan's island and the main shore.
Q. And boats ran there?
A. Yes, sir.
Q. How long did they continue to run that way?
A. I don't know; I did not see that part of the river for several years afterwards.
101 Q. You saw it when your Sectional Dock Company went down to Lesperance street and located there. What was there between Duncan's island and the main shore or the Missouri shore?
A. Between Duncan's island and the main shore there was water, except where the dykes run out there, and at any ordinary stage of water there was water all along there; there was water in there pretty nearly all the time, in fact.
Q. About how deep was the water at the time the Iron Mountain Railway Company built that trestle-work over Lesperance street?
A. When they drove the piling the depth of the water was about four or five or six feet along there.
Q. South of Lesperance street how much was it?
A. South of Lesperance street the water was not quite so deep as that.
Q. Did the Iron Mountain Railway Company build a trestle south of Lesperance street also?
A. Yes, sir.
Q. How far south did that trestle run?
A. It ran as far as Barton street, I believe.
Q. Do you know how far east of Kosciusko street that trestle was, or how far south of Lesperance street?
A. How is that?
Q. How far east of Kosciusko street was it that the Iron Mountain constructed this trestle-work south of Lesperance street?
A. I don't exactly understand your question yet.

Q. (Showing a plat to the witness.) Take this plat. Here is Lesperance street indicated on this plat; here is Kosciusko street. Now, when you went down to the Sectional Dock Company in 1858, was there any main street running along there south of Lesperance street?

A. No, sir.

Q. What was there there?

102 A. Water.

Q. What was on the first street next to the river south of Lesperance street?

A. Kosciusko street.

Q. Now, how far from Kosciusko street was it to the river at that time, or to the water?

A. About 100 or 150 feet—to the slough, I mean.

Q. How far east of Kosciusko street to the river today at that point?

A. About two thousand feet, I reckon.

Q. Now, this slough ran about there, as indicated on this map, east of Kosciusko street. You say the slough was 100 to 150 feet to a point down south of Lesperance street?

A. Yes, sir.

Q. Where did the Iron Mountain railroad construct that trustle-work?

A. It was about 100 feet from the edge of the slough east.

Q. 100 feet from the edge of the slough?

A. Yes, sir.

Q. Was it built over the slough?

A. Yes, sir.

Q. The trestle-work was built over the slough?

A. Yes; or through it.

Q. Was it in the same place that it is now—that the Iron Mountain railroad track is now?

A. They have made some little alterations. They have got so many tracks now that I could not exactly locate at this time.

Q. You remember the one they had there first?

A. Yes, sir.

Q. Was that trustle that you say was built there over the water?

103 A. Yes, sir.

Q. After they built that trustle-work there how long did it remain before it was built up so as to make an earthen bank there? How long did the trustle stay there before they filled it up?

A. I think it was three or four years after that before they commenced to fill it up.

Q. Where did they get the dirt to fill it, do you know?

A. They got it from Carondelet—from what is called Picot hill, at Carondelet.

Q. And they hauled it up there?

A. Yes; it was brought up there in cars.

Q. Did the Sectional Dock Company do any filling there?

A. My recollection is not very good about that. I don't recollect what they done there.

Q. What use did the Sectional Dock Company make of the property after they built the docks there?

A. They built a blacksmith shop and an oakum shop and storerooms and an office, etc.

Q. That portion of the property that was not covered by these buildings and shop—what use did the company make of that?

A. Which?

Q. The portion of the property south of Lesperance street.

A. Nearly all of the property down there we had in use, with the exception of a few rods which we occupied by storing our lumber on it.

Q. How long did the company continue to use that property?

A. They used it ever since I went there.

Q. Since 1858?

A. Yes, sir.

104 Q. Has there ever been a time when anybody else used any portion of that property since 1858, that you have any information of, except the use of that made of it by the Sectional Dock Company?

A. You mean the property that the dock company leased?

Q. Yes.

A. I do not know; I have an idea that they had a derrick or so on the lower end of the property, but I could not say when it was; that was the only thing that I know of occupying any part of our property.

Q. Was that south of Trudeau street that the derrick was placed?

A. I think it was about Trudeau street where the derrick stood.

Q. Has there any person that you know of used any part of that property between Russell avenue and Barry street, as it used to be called, on the north of Trudeau street or on the south, except the Sectional Dock Company?

A. None that I know of.

By Mr. BELL: I object to that.

By the COURT: He may answer it.

Cross-examination by LEVERETT BELL, Esq.:

Q. Did you ever see the railroad trains running up and down there? I am speaking of the dock property,

A. What we took a lease from the city for?

Q. Yes, sir.

A. There are six railroad tracks on it today.

Q. Running up and down on the property that the dock company leased from the city?

A. I don't know whether there is or not.

105 Q. (Showing a plat to the witness.) Will you look at this plat here and tell me where the property is that the dock company occupied?

A. I don't know as I can describe it.

Q. Here on this plat now, here is Lesperance street; this is Picot street; here is Trudeau street. Now, when you first went down there, did you not occupy from Lesperance street south?

A. Yes, sir.

Q. Did you see these railroad tracks there? You saw them after you went there, did you not?

A. They were not there when the dock company went there.

Q. I did not say they were; were they ever there after the dock company went there?

A. There is some railroad tracks there, but whether they are on the property that was leased by the city is something that I do not know.

Q. You do not know what property was leased from the city?

A. I know that the dock company leased from the east wharf line.

Q. Do you know what property they did lease?

A. I could not tell you, no, unless I would see the description.

Q. You have testified as to the dock company occupying other property. Now, did you ever know of railroad tracks ever being operated on property occupied by the dock company, that was there on that land?

A. I don't know whether they did or not.

Q. You know the land occupied by the dock company, do you not?

A. Yes, sir.

Q. My question is whether on the land occupied by the dock company any railroad tract at any time existed?

106 A. There may be one railroad track on it.

Q. Was that track used by the cars?

A. Not that I know of.

Q. That never was used?

A. I do not know anything about it. I have not been on the ground since the railroad tracks were built there.

Q. You never knew anybody occupy any part of the ground occupied by the dock company since the dock company occupied it; is that your testimony?

A. I do not know it.

Q. Don't you know it has been occupied by railroad tracks?

A. I say it may be occupied by railroad tracks, but I do not know it, because I do not know where the lines are.

Q. I don't care whether you know where the lines are or not; that is not my question. You have undertaken to swear here that the dock company occupied certain property. Now, my question is whether the railroad company did not also occupy that property? You know where the property is that they occupy, even if you do not know the lines, because you have undertaken to swear to this jury to the occupation of certain property. Now, my question is whether that property has not also been occupied by the railroad company?

A. I have tried to answer you that question as near as I know how. I do not propose to say anything that I do not know.

Q. This railroad has been put on that property, has it not?
A. It was since I was on the dock property, though.
Q. What year was that?
A. That was in 1875; I guess it was. I do not know what occurred on the property occupied by the dock company since
107 1875 or 1876.
Q. You do not know what occurred there?
A. Not sufficiently to locate a railroad track.
Q. When you went there in 1858 there was a dyke extending on Lesperance street from the main line out to what was then called Duncan's island, was there not?
A. Yes; and I think it projected a little outside.
Q. It went across what was called Duncan's island and projected east into the Mississippi river?
A. Yes, sir.
Q. That was a dyke on which a person could travel from the mainland to the so-called Duncan's island?
A. Yes, sir.
Q. That was about at Miller street. There was no other dyke north of that?
A. Yes, sir.
Q. North of that there was another dyke?
A. Yes; but I do not know as I recall the street.
Q. You have only spoken about two dykes, one at Miller street and one at Lesperance.
A. Yes; one at Miller street, one at Lesperance, and one at Barton.
Q. Do you know what years they were built?
A. No, sir.
Q. They were built prior to 1858, were they not?
A. Yes, sir.
Q. And since they were built they precluded navigation between the so-called Duncan's island and the Missouri shore, do they not?
A. Yes, sir.
Q. Therefore, when you speak of boats having navigated
108 the Mississippi river between Duncan's island and the Missouri shore you mean that this navigation took place at some period anterior to the building of the dykes?
A. I wish you would state that question again; it is so long.
Q. Now, you were a navigator yourself, were you not, Captain?
A. I have steamboated some.
Q. What years?
A. I steamboated in 1857 and at different times after that. I was steamboating at the time I was connected with the Sectional Dock Company, and I remember of steamboats going there.
Q. I want to know what years you were in the employ of the steamboat company, if you can tell me?
A. In 1857.
Q. Where was that boat navigated, where was it run?
A. To Cincinnati and New Orleans.

Q. Did you ever, on a boat, navigate between Duncan's island and the Missouri shore?

A. I was a passenger on the boat that went up there.

Q. Now, why don't you answer my question? My question is this: Whether, during the time you were employed on a steamboat from 1858, when that steamboat was running between St. Louis and Cincinnati, did that steamboat on which you were employed ever navigate between Duncan's island and the Missouri shore?

A. No, sir.

Q. These dykes had been built prior to 1857?

A. I don't know anything about that.

By the COURT: I understood the witness to state that his boat ran from Cincinnati to New Orleans.

109 By the WITNESS: Yes, sir.

By Mr. BELL:

Q. When was it you were traveling on a steamboat that navigated between Duncan's island and the Missouri shore?

A. In 1846.

Q. That was the only time you traveled on a steamboat between Duncan's island and the Missouri shore?

A. Yes, sir.

Q. What time of the year was that?

A. I think it was about June.

Q. That was during the period of high water?

A. I don't recollect the stage of the water at the time.

Q. Is not June the usual period of high water?

A. Yes, sir.

At this point the court adjourned the further hearing of this cause until 10 o'clock a. m. tomorrow morning.

10 O'CLOCK A. M., WEDNESDAY, *April* 27, 1892.

The trial of this cause progressed as follows:

Testimony of AUGUST RAUSCHENBACH, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by WILLIAM C. MARSHALL, Esq.:

Q. Please state your full name.

A. August Raschenbach.

Q. What is your business?

A. I am at present assistant street commissioner.

Q. What is your profession?

A. I am a surveyor and civil engineer.

Q. How long have you been a surveyor?

A. I have been a surveyor of the city since 1854.

Q. How long have you been employed by the city?

A. Since 1854.

110 Q. Did you at any time make a survey of the country south of Lesperance street?

A. Yes, sir.
Q. When?
A. In 1865; in February and March, 1865.
Q. Have you a survey that you made at that time with you?
A. Yes, sir.
Q. Will you produce it?

(The witness produces a paper.)

Q. Is that the paper which you hold in your hand?
A. That is a plat of it—that is, the wharf surveyed from the sheds sough. This plat shows the survey of the wharf lines from Chauteau avenue south. At the same time I made another survey from Barton street to the northern limits.
Q. Will you please indicate to the jury the condition of the property between Lesperance and Barton streets when you made that survey in 1865?

By Mr. BELL:

Q. Is that a plat that was made by you?
A. It was made under my direction in the office.
Q. Do you mean by some other draug-sman?
A. Well, he put in the names of the street-.
Q. Did you put in anything?
A. I put in the lines here.
Q. Did you make a survey south of Lesperance street?
A. Yes, sir.
Q. Commencing at Lesperance street?
A. I commenced at Chauteau avenue and went south to the southern city limits, near Keokuk street.
Q. Is that plat correct?
A. Yes, sir.

By Mr. MARSHALL (resuming the examination):

111 Q. Now show the jury where Lesperance street was at that time.

A. This is Lesperance street here; this is Main street, and this is the dyke, at the foot of Lesperance street. This is the original portion of the dyke right here, with marks to designate the rock—this blue line. Now, in February, 1865, *1865*, the water was very low in the river, and this shows the water edge at that time; this is about opposite Picot street, now Russell avenue. There was a slough came in here, which drained the water from above here. This drain from the west here emptied into the river. I found at the time several buildings—little frame sheds—and I have my field book here to show what they represented. I have my original field book here. (Witness produces field book.) The first one represented here south of Lesperance street near the water edge, about eleven feet eight inched from the river bank, was the machine shop, sixty-five feet six inches by thirty-five feet; that is this building here; that was used by the dock company at the time; then sixty feet from that there was a frame house thirty-two feet four inches by

sixteen feet three inches. I have marked it here dry-dock office, that was the office of the dry dock; then sixty-five feet six inched from that, further west, I have marked here frame stable; that is here, eighteen feet three inches by eighteen feet three inches square. Then there is another building south of that, sixty-eight feet two inches south, about thirty feet square. I do not know for what purpose it was used. I found these buildings there. There was some more buildings down here.

Q. Don't you go further south than Trudeau street. We won't bother anout those.

A. All right.

112 Q. How far west did this slough that is represented on this plat as being between Picot and Trudeau street extend westwardly?

A. This is only a narrow ditch draining the water from the surface and carrying it into the river; that was all made ground; there was a slough north of Lesperance street called slough pond.

Q. Now, what does the red line along what you call the water line indicate?

A. This heavy red line indicates the proposed east line of the water as fixed by the ordinance 5403 passed August, 1864.

Q. What does the red line west of that indicate?

A. The west line of the wharf as established by that ordinance; that is 300 feet parallel to and at right angles with the red line of Main street.

Q. Can you tell how far from Main street that last red line was established?

A. Three hundred feet.

Q. Three hunfred feet from Main street?

A. Yes, sir.

Q. And the wharf between these two red lines you established how wide?

A. That is also three hundred feet.

Cross-examination by LEVERETT BELL, Esq.:

Q. These improvements that you speak of are north of Russell avenue, are they not, or Picot street, as it was called on that day?

A. Some are and others are not; they are between Lesperance and Picot streets. If you continue the line of Russell avenue eastwardly it would strike about that frame building.

Q. Was there any building indicated there that lies south of Picot street between it and Trudeau?

113 A. Between Picot and Trudeau?

Q. Yes.

A. No; there was no building there.

Q. This property that was sued for in this case lies between Picot street and Trudeau street if the lines of those streets were extended to the Mississippi river?

A. Yes, sir.

Q. At the time that you made that survey before there was any

improvement on this property there was no buildings on the north as indicated by that, was there?

A. Yes; there was one building at that time, if the lines were prolonged, between Picot and Trudeau streets.

Q. This building on the north of this north line is the one you mean?

A. This building is not located according to the lines, so that if that line is continued it would strike at about this building.

Q. The southern part of the building or the northern part of the building or the central part; on which would the main part of the building lie?

A. I could not tell you that unless I had a rule. These buildings were not located on any particular lines of the street.

Q. This survey was made in the winter of 1865?

A. Yes; in January and February.

Q. At the river front between Trudeau and Picot streets you found the street as shown there?

A. Yes, sir.

Q. It was a very low stage of water?

A. Yes, sir.

Q. This slough indicated here is a slough setting in from the west and draining into the Mississippi river?

114 A. Yes, sir.

Q. At the time that you made this survey were there any other indications of Duncan's island than what you have established on this survey?

A. No, sir.

Q. Practically all appearances of Duncan's island had disappeared from the earth's surface when you made that survey?

A. Yes, sir.

Q. If Duncan's island ever existed at the time you made this survey it was west of the red line that indicates the red line of the wharf?

A. Well, I could not say where Duncan's island was.

Q. At the time that you made this survey, if Duncan's island ever existed it was west of this west line—that is, there was no Duncan's island in front of that red line?

A. This was all water. I could not say where Duncan's island was.

Q. You cannot say that at the time you made this survey, in the winter of 1865, whether it was all open water in front of that red line?

A. That was all open water.

Q. There was no appearance of an island or anything of the sort there?

A. No, sir.

Q. Do you remember of the Lesperance-street dyke when it was filled there?

A. I believe that was filled in 1856 under Henry Keiser. I am not quite sure; it may have been in 1855.

Q. Do you know when the Miller-street dyke was built?

A. These dykes were built at about the same time.

114½ Q. The Chauteau-avenue *street* dyke and the Ashland-street dyke?

A. I am not sure about that; each one of these dykes were built about the same time.

Q. They were all built about the same time?

A. Yes. Lesperance street and the Barton street was, but I don't know about the Hazel street and Chauteau avenue; of course the pilings were there at the time I made that survey.

Q. The Barton street and the Lesperance street were the only dykes you speak of as having been made in 1858?

A. This Barton-street one and this one.

By Mr. MARSHALL: I will offer this plat in evidence.

(Here insert plat No. 5.)

(Here follows map marked p. 115.)

116 By Mr. BELL: Will you please indicate on that plat the east line of block 868?

A. This map don't show the block. At that time these blocks were not defined.

Q. Can you just draw in pencil about where the block 868 came?

A. There are no distances given.

By Mr. MARSHALL: I will concede that it came west of the wharf line there.

By Mr. BELL:

Q. Well, draw the western wharf line there.

(Witness draws a line on the plat.)

By Mr. BELL: Now, Mr. Marshall, it is conceded that this red line is the east boundary of block 868.

By Mr. MARSHALL: I will concede that.

By Mr. BELL:

Q. Now, I want to ask you this question: Here is block 868 and it is conceded that this is the east line of block 868. Now, this is the ground that we are sueing for in here. Now, I want to know when you made this survey in 1865, assuming that to be the east line of block 868 here, was all this ground in block 868 indicated in your survey?

A. Yes, sir.

Q. Two or three hundred feet in width?

A. Yes, sir.

Testimony of Captain GEORGE W. FORD, a witness called on behalf of the defendant-, being duly sworn, testified as follows:

Direct examination by WILLIAM C. MARSHALL, Esq.:

Q. Please state your name in full.

A. George W. Ford.

Q. What is your business?

A. At present, assistant harbor and wharf commissioner.

117 Q. How long have you held that position?

A. About fifteen years, I think—ever since the place was created.

Q. Do you know the country on the west bank of the Mississippi river south of Chauteau avenue?

A. Yes; I am pretty familiar with the whole front. I do not know the names or the feet and inches.

Q. Do you know Duncan's island?

A. I remember Duncan's island a good many years ago. I have not seen it for a long while.

Q. What has become of it?

A. It is covered up by rocks. It has disappeared.

Q. When did you first know Duncan's island?

A. In 1846.

Q. At that time was there any water between Duncan's island and the west bank of the Mississippi river?

A. If my memory serves me right, I have came up between the mainland and the island on a steamboat since 1846. It was in extremely high water when we did that.

Q. You came up between Duncan's island and the Missouri shore?

A. Yes, sir.

Q. On a steamboat?

A. Yes, sir.

By Mr. BELL: In extreme high water?

A. Yes; in extreme high water.

By Mr. MARSHALL:

Q. That was in what year?

A. Between 1846 and 1849. I do not remember the exact date.

Q. Do you remember when the Iron Mountain railroad constructed trustle along there?

118 A. I remember a trustle along there of late years.

Q. Do you remember whether or not when the trustle was constructed it was constructed on the ground or over the water?

A. It was over water or very low land. Sometimes it was dry.

Q. What became of the trustle?

A. It was covered up.

Q. With what?

A. With debris from the city—filled up by the city.

Cross-examination waived.

Counsel for the defendant offered in evidence certified copy of ordinance 5403—an ordinance to establish and open a wharf to Biddle street, on the northern boundary of the city, and from Hazel street to the southern boundary of the city.

Ordinance # 5403.

Ordinance to establish and open the wharf from Biddle street to the northern boundary of the city and from Hazle street to the southern boundary of the city.

Be it ordained by the common council of the city of St. Louis:

SECTION FIRST. The wharf is hereby established as a public highway for wharf purposes, from the south side of Biddle street to the northern boundary of the city of St. Louis; and from the south side of Hazle street to the southern boundary of the city of St. Louis: The western boundary line of the northern portion of the wharf, as herein established shall commence at a point in the south side of Biddle street, at the northeastern corner of city block number nineteen; thence northwardly on a line in continuation of the eastern front line of city block number nineteen, to a point which is eighty feet eastwardly from Lewis street, measured on a line at right angles thereto; thence northwardly
119 parallel with Lewis street and eighty feet eastwardly therefrom, to the north side of Smith street; thence northwardly to a point in the north side of Florida street, which point is three hundred and seventy-five feet eastwardly from Main or First street; thence northwardly to a point in the south side of East Mound street, which point is three hundred and thirty-seven and a half feet distant eastwardly from said First street, thence northwardly to a point in the north side of East Mound street, which point is three hundred and thirty-five feet distant eastwardly from said First street; thence northwardly to a point in the north side of Lebeaum street, which point is three hundred and thirty-five feet distant eastwardly from said First street; thence northwardly to a point in the south side of Dock street, which point is nine hundred and twelve feet distant eastwardly from said First street; thence northwardly in continuation of the last line, to the north side of Dock street; thence eastwardly along the north line of Dock street produced one hundred and fifty feet; thence northwardly to the northern boundary line of the city of St. Louis, on the line which passes a point in the center of Ferry street, which point is two thousand five hundred feet distant eastwardly from said First street, measured along the center line of said Ferry street. The eastern boundary line of said northern portion of the wharf, as herein established, shall commence at a point in the south line of Biddle street produced eastwardly, two hundred and ten feet distant from the northeastern corner of city block number nineteen thence northwardly to a point in the north line of Ashley street produced eastwardly two hundred and thirty feet distant from the western line of the wharf as herein established; thence northwardly to a point in the north line of Smith street produces eastwardly two hundred and thirty feet distant from the western line of the
120 wharf; thence northwardly to a point in the north line of East Mound street produced eastwardly, two hundred and sixty feet from the said western line of the wharf, thence north-

wardly to a point in the northern boundary line of the city of St. Louis, which point is three hundred feet distant eastwardly from the said western boundary line of the wharf. The western boundary line of the southern portion of the wharf, as herein established, shall commence at a point in the south side of Hazle street, which point is three hundred feet distant eastwardly at right angles from *from* First or Main street, thence southwardly, parallel to said First street and three hundred feet distant eastwardly therefrom, to a point in the southern boundary line of Rock Point addition to the city of St. Louis; thence southwardly to a point in the southern boundary line of the city of St. Louis, which point is six hundred and sixty feet distant on a course south eighty-one degrees east from *from* the center of the main track of the Iron Mountain railroad. The eastern boundary line of the said southern portion of the wharf as herein established, shall commence at a point in the south line of Hazle street produced eastwardly, which point is five hundred and sixty-five feet eastwardly from said First street; thence southwardly to a point in the center line of Lesperance street, which point is three hundred feet distant eastwardly from the said western line of the wharf; thence southwardly parallel with the said western line of the wharf and three hundred feet distant eastwardly therefrom, to the southern boundary line of the city of St. Louis.

SECTION SECOND. So much of the grounds included within the boundaries of the northern portion of the wharf, as hereinbefore established, as are necessarily occupied by the water works of the city of St. Louis, shall remain in the occupancy of the said
121 water works until the said works shall be removed to some other locality.

SECTION THIRD. The land commissioner is hereby authorized and instructed to cause the wharf as hereinbefore established, to be opened according to law.

Approved Aug. 6th, 1864.

I, Joseph A. Wheny, regester of the city of St. Louis, hereby certify the foregoing to be a true copy of the original, on file in this office, of an ordinance passed by the common council of the city of St. Louis "entitled" An ordinance to establish and open the wharf from Biddle street to the northern boundary of the city and from Hazle street to the southern boundary of the city, and numbered 5403.

In testimony whereof I have hereunto set my hand and affixed the seal of the city of St. Louis this 5th day of November, 1891.

[SEAL.] JOS. A. WHENY, *Regester.*

Counsel for the city also offered in evidence the petition in the case of The City of St. Louis, plaintiff, *vs.* Thomas Allen *et al.*, with the return of the marshall showing service upon the various parties, being a proceeding in the name of the City of St. Louis for the purpose of condemning property under ordinance 5403, dated the 17th day of September, 1866.

By Mr. BELL: I want to object when the proper time comes.

By Mr. MARSHALL: The offer will include the condemnation of 300 feet, as being 300 feet as indicated in this plat or survey made by Mr. Rauschenbach, lying east of city block 868. I offer
122 to prove that damages were assessed in favor of Theresa Picot, Celestine Pim, and others, and according to the judgment of the land commissioner damages were allowed in various amounts therein set forth.

By Mr. BELL: This is a proceeding, if your honor please, that has been ruled on by supreme court to be absolutely void on the ground that the city did not attempt to agree with the owners of the property as required by the charter in that case. I therefore object to the introduction of these proceedings in evidence. This whole question was discussed before your honor in the case of Lynch *vs.* The City, and on that occasion the objection was sustained.

The court overruled the objection; to which ruling of the court counsel for the plaintiff then and then duly excepted.

Testimony of Mrs. CELESTINE PIM, being called on behalf of the defendant-, testified as follows:

Direct examination by WILLIAM C. MARSHALL, Esq.:

Q. Will you please state to the jury the day of the month and the year you were born?

A. May 3, 1842.

Q. Will you please state the day and the year and the month when you were married?

A. The 6th of December, 1865.

The defendant- here rested *its* case on the evidence. There was no further testimony.

The plaintiff moved the court to give the following instructions, which the court refused, and the plaintiff then and there excepted.

Plaintiff's Instructions Refused.

PIM
vs.
CITY OF ST. LOUIS *et al.*

123 The court instructs the jury that this is an action of ejectment to recover an undivided one-half interest in the following-described premises, in the city of St. Louis, Missouri, to wit: A lot of land in front of block 868 of the city of St. Louis and between it and the Mississippi river, bounded east by said river, west by the east line of block 868, south *of* the north line of Trudeau street produced to the river, and north by the south line of Russell avenue produced to the river; and the plaintiff has exhibited evidence that in 1876 a tract of ground on the west bank of the Mississippi river was conceder to Joseph Brazeau by the Spanish government, and that said concession was augmented in 1799, and that the same was surveyed to Brazeau in 1803 and was con*fi*ned to Brazeau or his

legal representatives by the board of commissioners for adjusting title to land in Missouri in 1835, and that said confirmation was reported by said commissioners to the Commissioner of the General Land Office and by him reported to the Congress of the United States and was confirmed by an act of Congress of July 4, 1836; and the plaintiff has exhibited a regular and complete chain of conveyances from said Brazeau to himself *from* said interest in said premises and evidence tending to show that the premises in controversy are accretion to the tract of ground aforesaid originally owned by Brazeau, and, if the jury believe that the above evidence is true and that the documents referred to are genuine documents or copies of genuine documents, and if the jury believe that the plaintiff was a married woman in 1865 and continued to be one and she and her husband continued to live as man and wife until the death of the husband and that said death occurred in 1888, then plaintiff is entitled to a verdict for the possession of the undivided one-half of the premises sued — and such damages as the jury find from the evidence for the detention of said interest in said
124 property from January 15th, 1892, the day this action was commenced, to the present time, and the jury will state in their verdict the value of the monthly rents and profits of said one-half interest in the property as they find the same from the evidence in the cause.

The court instructs the jury that by the term accretion as used in the instruction herein is meant a formation of land attaching to the river front of premises by gradual deposits from the river occasioned by artificial structures, such as dykes extended into the river or otherwise or by filling in the river front by deposits of earth there by private parties or corporations.

If the jury believe from the evidence that the premises spoken of as Duncan's island were in the Mississippi river, separated from the mainland by a slough, and the city of St. Louis, in 1857 or before, erected dikes at Lesperance street and other streets extending across the slough and across said premises known as Duncan's island and to the water east thereof, and that subsequently the slough was filled up by the action of the dikes and by filling done by the Iron Mountain Railroad Company and the defendant herein, so that the premises known as Duncan's island became a part of the main shore, then said premises known as Duncan's island constituted accretion to the main shore.

The court instructs the jury that in consideration of this case they will exclude from their minds all evidence tending to show that defendants or either of them held possession of the premises sued — prior to the act of Congress of 1874, read in evidence, obviating the necessity for patents, and that in this case the statute of limitations does not commence to run until the date of said act in 1874, and if the jury believe from the evidence that the
125 plaintiff was a married woman at said date, in 1874, and that she continued to be a married woman and lived with her husband continuously to his death and said death occurred in the year 1888, then the plaintiff has ten years from the death of

her husband, in 1888, to bring this action and she is not barred by limitation.

The court instructs the jury that there is no evidence in this cause that defendant- or either of them have any interest in or right to the premises in controversy or any part thereof by deed, possession, or in any manner, and there is no evidence that the St. Louis, Iron Mountain and Southern Railway Company has any title to said premises or any part thereof.

The court gave the following instructions for the plaintiff:

Plaintiff's Instructions Given.

PIM
vs.
CITY OF ST. LOUIS *et al.*

The court instructs the jury that the wharf condemnation proceedings read in evidence were void and invested the city of St. Louis with no title or claim to the property sued for.

If the jury finds for the plaintiff, they will find that she is entitled to the possession of one undivided half of the premises and damages for the detention thereof from Jan. 15, 1892, to the present time, and the jury will state in their verdict the value of the monthly rents and profits of said one-half interest.

The court gave the following instructions for the defendant-, to each and every one of which the plaintiff objected and excepted:

Defendants' Instructions Granted.

The court instructs the jury that an island in the Missis-
126 sippi river is a body of land surrounded by water. If, therefore, they believe from the evidence that what was formally called Duncan's island was at the date of the deed from Papin to Honore Picotte a body of land in the Mississippi river separated from the main shore by a channel or slough through which water flowed, it was in fact an island, though at times when the river was below its ordinary low-water stage water ceased to flow through said channel or slough.

The court instructs the jury that if they believe from the evidence that at the date of the deed from Theodore Papin to Honore Picotte what was formerly called Duncan's island was in reality an island as defined in these instructions, and that it was situated directly east of the property described in said deed, and that the property sued for lies east of where the middle line of said channel or slough which separated the slough from the mainland was and became attached to said Duncan's island by accretion thereto or was a part thereof, then they will find for the defendants.

If the jury believe from the evidence that at the date of the partition deed to Papin and of Papin to Honore Picotte the lower end of Duncan's island lay above the north line of the property described in the deed from Papin to Honore Picot on the mainland extended

eastwardly, and that the property in dispute is not an accretion to the said property described in said deed to Honore Picotte, but an accretion to said island, they will find for defendants.

The court instructs the jury that by the terms accretion herein used is not meant filling done by the city, the Sectional Dock Co., or the Iron Mountain Railroad Co., but accretion means natural accumulations; and if the jury believe from the evidence
127 that the property here sued for was made by the city, the Sectional Dock Co., or the Iron Mountain Railroad Company filling up the slough between Duncan's island and the mainland of the Missouri shore and not by natural accumulations, then their verdict must be for the defendant-.

The court instructs the jury that if they believe from the evidence that the defendant St. Louis Sectional Dock Company during the lifetime of Honore Picotte entered upon the land sued for and actually and wholly occupied the same in their business and from the time of said first occupation so occupied the same continuously for ten consecutive years, holding the same throughout such period openly, peaceably, exclusively, and adversely to all persons claiming it in good faith as their own or as tenants of the defendant The City of St. Louis, then the defendants have acquired title thereto by the statute of limitations, and you will find for defendants.

The court instructs the jury that if they believe from the evidence that the possession of the city, through the Sectional Dock Co., began during the lifetime of Honore Picotte and was open, adverse, continuous, and notorious, as described in the other instructions *gave*, then the subsequent death of said Picotte during the minority or coverture of the plaintiff herein did not have the effect of stopping the running of the statute of limitations, and if such possession of the city continued for ten years before the institution of this suit, then their verdict must be for the defendant-.

The jury are instructed that in the instructions in reference to the defendants acquiring title to the property in dispute by the statute of limitations it is not meant that every foot of said land must have been continuously occupied for ten years at all times, but that the occupation must have been *for* such a kind,
128 evidenced by an inclosure or by visible token of possesssion clearly defining the limits of possession and calculated to give notice to the true owner, and such that in itself excluded and was inconsistent with the possibility of any other person at the same time occupying and using the land or any part thereof adversely to the defendants; and if occupation was of such a nature it did not cease to be continuous because by reason of changing piles of lumber or otherwise — any particular spot thereof because temporarily vacant and unused, and that such adverse possession must be made out by clear and positive proof.

The jury, on April 28, 1892, returned a verdict for both defendants. Afterwards and within four days and during the term the plaintiff moved for a new trial in words and figures as follows, to wit:

Plaintiff's Motion for a New Trial.

CELESTINE PIM, Plaintiff,
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY, Defendants.
} St. Louis Circuit Court. 87443. 5.

The plaintiff moves for a new trial herein on the following grounds, viz:

1. The court erred in giving the instructions and each of them given for the defendants.
2. The court erred in refusing the instructions and each of them asked by the plaintiff and refused.
3. The court admitted incompetent and illegal testimony on the part of the defendants and against the objection of plaintiff.

129 4. The verdict and judgment in favor of the defendant The St. Louis Sectional Dock Company were irregular, illegal, and void under the judgment by default herein against said company.

5. The jury were not fully instructed as to the law of this case.
6. The verdict was against the law and the evidence and both.
7. The court erred in excluding, on defendants' objection, competent and legal testimony offered by the plaintiff.

LEVERETT BELL,
With GEORGE J. AND HENRY B. DAVIS,
Attorney for Plaintiff.

Said motion was continued until the June term, 1892, when it was overruled, and plaintiff then and there duly excepted. That the following proceedings may be preserved, this bill of exceptions is signed, sealed, and made part of the record this 22nd day of September, A. D. 1892, during said term.

LER-Y B. VALLIANT, *Judge.* [SEAL.]

And which affidavit for appeal is in words and figures as follows, to wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

Affidavit for Appeal.

In the Circuit Court, City of St. Louis, June Term, 1892.

PIM
vs.
CITY OF ST. LOUIS.
} Affidavit for Appeal.

STATE OF MISSOURI, } ss:
City of St. Louis, }

130 Leverett Bell, attorney for plaintiff herein, being duly sworn, makes oath and says that the appeal prayed for in

the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

LEVERETT BELL.

Subscribed and sworn to before me this 28th day of September, A. D. 1892.

PHILIP H. ZEPP, *Clerk.*

Clerk's Certificate.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remains of record in my office.

In testimony whereof I hereunto set my hand and affix
[SEAL.] the seal of said court, at office, in the city of St. Louis, this 15th day of March, 1893.

PHILIP H. ZEPP, *Clerk.*

131 And afterwards, to wit, on the 21st day of April, 1894, the further following proceedings were had in said cause, viz:

CELESTINE PIM., App.,
vs.
CITY OF ST. LOUIS *et al.*, Resp.

Come now the said parties, by attorneys, and, after argument herein, submit this cause to the court.

And afterwards, to wit, on the 12th day of June, 1894, the further following proceedings were had in said cause, viz:

CELESTINE PIM, Appellant,
vs.
CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY, Respondents.

6529. Appeal from Circuit Court, City of St. Louis.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said circuit court of the city of St. Louis rendered, be in all things affirmed and stand in full force and effect, and that the said respondents recover against the said appellant their costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

132 In the Supreme Court of Missouri, Division No. 2, April Term, 1894.

CELESTINE PIM, Appellant,
vs.
THE CITY OF ST. LOUIS *et al.*, Respondents.

Ejectment for the possession of an undivided one-half interest in a lot of land in front of block 868 of the city of St. Louis and between it and the Mississippi river, bounded east by said river, west by the east line of block 868, south by the north line of Trudeau street produced to the river, and north by the south line of Russell avenue produced to the river, and having a width from east to west of about 300 feet and a length from north to south of about 346 feet and six inches. The city answered first by general denial; second, claiming adverse possession since 1868 and a plea of the statute of limitations. Plaintiff, by way of reply, denied all the allegations in the answer.

The St. Louis Sectional Dock Company made no appearance and judgment by default was rendered against it on Feb'y 4, 1892.

Upon a trial to a jury there was a verdict and judgment for the defendant, from which plaintiff appealed to this court.

In 1786 Jos. Brazeau obtained a concession of a tract of ten arpens from north to south, bounded on the east by the Mississippi river. In 1799 he obtained a second concession. The concession was confirmed by act of Congress in 1836.

Plaintiff showed a derivative title from Jos. Brazeau for the land sued for, known as the Picotte tract, the north and south line of which, if extended eastwardly to the west bank of the Mississippi river as now defined, would include said land.

It is further shown that Honore Picotte owned lot 2 at the time of his death, in 1860; that his wife died in 1869; that two
133 children of said marriage survived their parents, of whom plaintiff is one, and her sister, a Mrs. Wilkerson, is the other; that plaintiff was married in 1865 to Dr. L. T. Pim, who died in 1888. The will of Honore Picotte was introduced in evidence, by which all of his property, real and personal, was devised to his wife for life, with remainder in fee to the plaintiff and her sister, Mrs. Wilkinson.

The Brazeau tract is embraced in U. S. survey 3078, and plaintiff claims that the land in controversy is an accretion to that survey, and particularly to lot 2. Upon the other hand, defendant claims that it is not an accretion; that it was formed by the city permitting the Iron Mountain Railroad Company to construct a trustle in the river in front of said survey, and thereafter by the railroad company and the city and the Sectional Dock Company, as the lassee of the city, filling up where the trustle ran, and finally filling the low ground between the embankment thus formed and what was known as Duncan's island.

In 1835 the main channel of the river, as shown by said survey, was between Duncan's island and the Missouri shore. The land sued for lies east of the channel, as it was at that time. By filling

up Main street has been built in front of what was the eastern boundary of said survey, and the wharf has been created in part by filling done by defendant and partly by taking in Duncan's island. From 1870 to January 1, 1889, the Sectional Dock Company occupied the premises as the lessee of defendant city. There was also evidence that in 1884 the city of St. Louis rented the premises to the St. Louis Sectional Dock Company.

In 1884 the city by ordinance granted permission to the
134 St. Louis Transfer Railway Company to lay its tracks along the property. An amended franchise for the same purpose was granted said St. Louis Transfer Railway Company — 1885.

On the 17th day of June, 1870, plaintiff and her sister, Mrs. Wilkinson, by a deed in partition, divided block 868 and described it as follows in the fifth paragraph of the deed: "The north half of block 868 of said city of St. Louis, bounded east by the wharf, west by Main street, north by Picotte street, and south by the balance of the block," and by paragraph six bounded the southern half of the block in the same way, the northern half being partitioned to Mrs. Wilkinson and the southern half to Mrs. Pim.

The city showed by Thomas P. Morse that he had known the property in controversy intimately since June or July, 1858, and had seen it every day except during the years '69 to '73; that in 1858 it was about two blocks from where the river was then to where it is now—that is, two blocks have been added since; that the city first constructed dykes from the mainland to Duncan's island, and subsequently filled in between the dykes, thus connecting Duncan's island with the mainland; that the Sectional Dock Company built houses or buildings on the property in 1864; that in 1858 the Sectional Dock Company built houses or buildings partly in front of block 868 and partly further north; that the company used the property from 1858 to 1864, and then bought an old machine shop which had been erected in 1859 partly in front of block 868; that it was subject to overflow in an ordinary stage of water, and that the Sectional Dock Company built cribs for the purpose of keeping their lumber above the water; that at that time Kosciusko street was the nearest
135 street to the wa*ret*'s edge (Kosciusko street is the next block west of Main street); that from 1858 to 1864 the office of the Sectional Dock Company was on the lower part of Duncan's island; that from Lesperance street to Barton street in 1858 the river was from 100 to 200 feet wide between the Missouri shore and Duncan's island; that a portion was not filled until the Iron Mountain railroad commenced filling, in 1882 to '83, and was only completely filled a few years ago; that the city drove piling at Lesperance street where an eddy was forming and which threatened to wash away what was originally part of survey 3078, and thereby prevented such washing, and the Iron Mountain railroad hauled dirt and filled up the slough; that the old machine shop which the Sectional Dock Company purchased was located between Russell avenue and Trudeau street; that the Sectional Dock Company had been paying rent to the city for the property since 1858; that the

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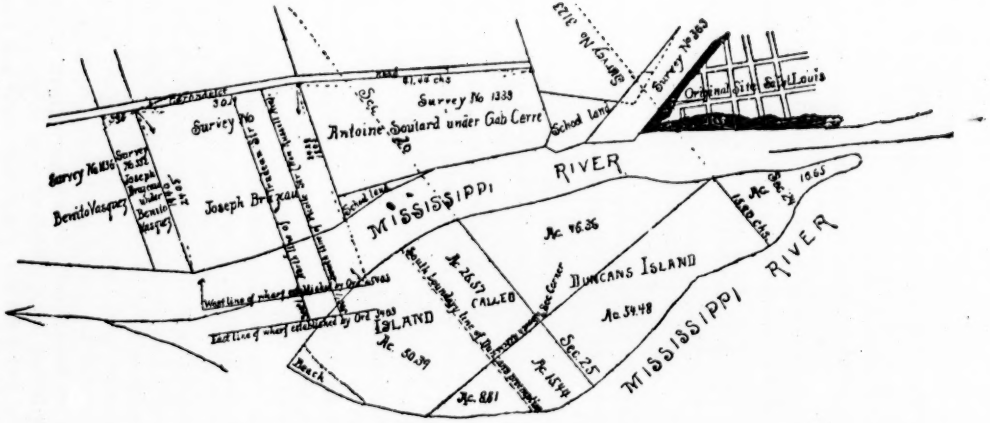

city connected Duncan's island with the mainland by building dykes at Barton and at Lesperance streets and then filled it between the dykes; that the Sectional Dock Company under its lease from the city piled lumber on block 868 in 1858 by building cribs to raise the lumber above the water, then filled up the slough between Duncan's island and the mainland.

The city showed by Henry Atkins, superintendent of the St. Louis Sectional Dock Company, that he had been connected with that company, beginning in 1856 and extending to the present time; that he knew Duncan's island in 1845 or '46; that in 1845 in medium stage of water the boats ran between the main shore and Duncan's island; that at the time the Iron Mountain trestle was built
137 there was 4, 5, or 6 feet of water between the island and the mainland; that the trestle extended from Lesperance street to Barton street; that the trestle was constructed about 100 feet from the east bank of the slough and extended over the slough; that the filling was done by the Iron Mountain railroad bringing dirt from Picot's hill, in Carondelet, and filling up the slough, and *by* the Sectional Dock Company also done filling; that the Sectional Dock Company has been in possession of this property since 1858 as lessee of the city.

August Rauchenbaugh testified that he had been in the employ of the city since 1854; that in 1865 he made a survey and location for the wharf lines south of Chouteau, extending as far south as Keokuk street; that at that time there was a slough between Picotte and Trudeau streets, and there were several frame buildings south of Lesperance street near the water's edge; about 11 feet 8 inches from the river bank was a machine shop 65 feet 6 inches by 35 feet that was used by the dock company at the time; then 60 feet from that there was a frame house 32 feet 4 inches by 16 feet 3 inches; that was the office of the dry — office; then 65 feet 6 inches from it further west was a frame stable; that the heavy red line on a map used to illustrate the location of the property and surroundings, hereto annexed, indicates the proposed east line of the water as fixed by ordinance 5403, passed in August, 1864, and the red line west of that indicates the west wharf line, 300 feet from the east line.

(Here follows map marked p. 136.)

Geo. W. Ford testified that he had known Duncan's island since 1846, and that in 1846 he came up the river to St. Louis and the boat passed between Duncan's island and the Missouri shore.

138 Mrs. CELESTINE PIM, being recalled on behalf of the defendants, testified as follows:

Q. Will you please state to the jury the day of the month and year you were born?

A. May 3, 1842.

Q. Will you please state the day and the year and the month when you were married?

A. The 6th of December, 1865.

At the instance of the plaintiff the court instructed the jury as follows:

1. "The court instructs the jury that the wharf condemnation proceedings read in evidence were void and invested the city of St. Louis with no title or claim to the property sued for."

2. "If the jury find for the plaintiff they will find that she is entitled to the possession of one undivided half of the premises and damages for the detention thereof from January 15, 1892, to the present time, and the jury will state in their verdict the value of the monthly rents and profits of said one-half interest."

The following instructions were given on the part of the defendants:

1. "The court instructs the jury that an island in the Mississippi river is a body of land surrounded by water. If, therefore, they believe from the evidence that what was formerly called Duncan's island was, at the date of the deed from Papin to Honore Picotte, a body of land in the Mississippi river separated from the main shore by a channel or slough through which water flowed, it was in fact an island, though at times when the river was below its ordinary low-water stage water ceased to flow through said channel or slough.

2. The court instructs the jury that if they believe from the evidence that at the date of the deed from H. Theodore
139 Papin to Honore Picotte what was formerly called Duncan's island was in reality an island as defined in these instructions, and that it was situated directly east of the property described in said deed, and that the property sued for lies east of where the middle line of the said channel or slough which separated the island from the mainland was and became attached to said Duncan's island by accretion thereto or was a part thereof, they will find for the defendants.

3. If the jury believe from the evidence that at the date of the partition deed to Papin and of Papin to Honore Picotte the lower end of Duncan's island lay above the north line of the property described in the deed from Papin to Honore Picotte on the main line extended eastwardly, and that the property in dispute is not an accretion to the said property described in said deed to Honore Picotte, but an accretion to said island, they will find for the defendants.

4. The court instructs the jury that by the term accretion herein used is not meant filling done by the city, the Sectional Dock Company, or the Iron Mountain Railroad Company, but accretion means natural accumulations, and if the jury believe from the evidence that the property here sued for was made by the city, the Sectional Dock Company, or the Iron Mountain Railroad Company filled up the slough between Duncan's island and the mainland of the Missouri shore and not by natural accumulations, then their verdict must be for the defendants.

5. The court instructs the jury that if they believe from the evidence that the defendant St. Louis Sectional Dock Company during the lifetime of Honore Picotte entered upon the land sued for and

actually and wholly occupied the same in their business, and
140 from the time of said first occupation so occupied the same continuously for ten consecutive years, holding the same throughout such period openly, peaceably, exclusively, and advers-ly to all persons, claiming it in good faith as their own or as tenants of the defendant The City of St. Louis, then the defendants have acquired title thereto by the statute of limitations, and you will find for the defendants.

6. The court instructs the jury that if they believe from the evidence that the possession of the city through the Sectional Dock Company began during the lifetime of Honore Picotte and was open, adverse, continuous, and notorious, as described in the other instructions given, then the subsequent death of said Picotte during the minority or coverture of the plaintiff herein did not have the effect of stopping the running of the statute of limitations, and if such possession of the city continued ten years before the institution of this suit, then their verdict must be for the defendants.

7. The jury are instructed that in the instructions in reference to the defendants acquiring title to the property in dispute by the statute of limitations it is not meant that every foot of said land must have been continuously occupied for ten years at all times, but that the occupation must have been for such a kind evidenced by an enclosure or by visible token of possession clearly defining the limits of possession and calculated to give notice to the owner and such that in itself excluded and was inconsistent with the possibility of any person at the same time occupying and using the land or any part thereof adversely to the defendants, and if the occupation was of such a nature it did not cease to be continuous, because by
141 reason of changing piles of lumber or otherwise any particular spot thereof became temporarily vacant and unused, and that such adverse possession must be made out by clear and positive proof."

It is claimed by counsel for plaintiff that her cause of action was not barred by the statute of limitations at the time of the commencement of this suit, and that it did not begin to run against her until the death of her husband, Dr. Pim, which occurred in 1888. If there was no actual possession taken of the land until after marriage to her husband, in 1865, her action was not barred, because it was brought within ten years after his death. Bradley *vs.* Mo. Pac. Railway Company, 91 Mo., 493; Dyer *vs.* Wittler, 89 Mo., 81. The statute did not run against her during her coverture unless possession was taken before her marriage, although the title in fee was vested in her; but the evidence tends to show that possession was taken by defendant city in 1858, during the lifetime of Honore Picotte, plaintiff's father, and from whom she acquired whatever title she had by devise to which the land here sued for had accreted. The evidence was ample upon which to predicate the instructions given for defendants upon that theory of the case. As the statute of limitations began to run against plaintiff's father, it continued to run against her, notwithstanding she may have been

under some statutory disability during a portion or all the time. Rogers *vs.* Brown, 61 Mo., 187; Cunningham *vs.* Snow, 82 Mo., 587.

There is no material difference in the facts as disclosed by the record in this case and the case of Wilkinson *vs.* The St. Louis Sectional Dock Co., 102 Mo., 130, in which case the instructions 5 and 7 here complained of were approved. The plaintiff in that case was a sister to the plaintiff here, acquired her title from the same
142 source, and one of the defendants here was the defendant in that. We think that case decissive of this in so far as the question of the statute of limitations is concerned. Instruction No. 6 given for defendant is in line with that decision.

If the plaintiff's cause of action was barred by the statute of limitations, as the jury must have found under the facts and instructions of the court, it is of no consequence that the land in controversy may have accreted to that which plaintiff acquired from her father by will.

It is further contended that there was no proof of the existence of Duncan's island in 1835, and that for that reason there was no proof upon which to predicate defendants' 1, 2, and 3 instructions, and they should not have been given. This contention is not born out by the record, as the plat therein shows that Duncan's island was surveyed by the surveyor general in 1835. This objection is not, therefore, well taken.

The plaintiff insists that as there was an interlocutory judgment rendered by default against the dock company on Feb'y 4, 1892, which was not set aside, and on July 18th, 1892, a judgment in favor of the dock company on the trial, that she is entitled to judgment against the dock company on the record. This contention seems somewhat technical and would not justify a reversal of the judgment upon the ground alone. Sec. 2100, R. S., reads as follows: "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." We are not prepared to say that the substantial rights of the plaintiff were affected by the failure to set aside the interlocutory judgment in favor of the plaintiff, even if it had not been done.
143 But, nothing to the contrary appearing from the record, it will be presumed that the interlocutory judgment was set aside before the final judgment was rendered. Blair *v.* Chicago & Alton R'y Co., 89 Mo., 383.

The judgment should be affirmed. It is so ordered. All of this division concur.

G. D. BURGESS, *J.*

144 And afterwards, to wit, on the 16th day of June, 1894, the further following proceedings were had in said cause, viz:

CELESTINE PIM, App.,
vs.
CITY OF ST. LOUIS *et al.*, Resp.

Comes now said appellant, by attorney, and files her motion for a rehearing and to transfer this cause to the court in banc.

Which said motion for a rehearing is in words and figures as follows, to wit:

In the Supreme Court of Missouri.

CELESTINE PIM, Appellant,
vs.
THE CITY OF ST. LOUIS *et al.*, Respondents.

Division 2.
April Term, 1894.
No. 6529.

The appellant moves for a rehearing because under the decision of the court as applied to the facts of the case a married woman is deprived of her property for failure to sue for it during the lifetime of her husband, when during all that time she had no right to the possession of it, and could not therefore maintain an action for such possession under the law and statutes of Missouri, which decision violates section 30 of article 2 of the State constitution of Missouri, which provides that no person shall be deprived of property without due process of law; and it also violates section 10 of article 1 of the Constitution of the United States, that provides that no State shall pass any law impairing the obligation of contracts; and also the 5th amendment of said Constitution, providing that no person shall be deprived of property without due process of law; and also the 14th amendment to said Constitution, providing that no State shall deprive any person of property without due process of
145 law, and through the inadvertance of counsel the attention of the court was not called to the above view of the case.

LEVERETT BELL AND
GEO. J. AND H. B. DAVIS,
Attorneys for Appellant.

And which said motion to transfer cause to court in banc is in words and figures as follows, to wit:

In the Supreme Court of Missouri.

CELESTINE PIM, Appellant,
vs.
THE CITY OF ST. LOUIS *et al.*, Respondents.

Division 2.
April Term, 1894.
No. 6529.

The appellant, who is the losing party, moves the court to transfer this cause to the court in banc for decision on the ground that a Federal question is involved as follows, namely, that division 2 of this court held and decided and applied to the facts in this case the rule that a married woman is by the law and statutes of Missouri deprived of her property for failure to sue for it during the lifetime of her husband, when during all that time she had no right to the

possession of it, and could not therefore maintain an action for such possession under said laws and statutes, which decision is in violation of section 10 of article 1 of the Constitution of the United States, and also of the 5th amendment to said Constitution, and also of the 14th amendment to said Constitution.

LEVERETT BELL AND
GEO. J. AND H. B. DAVIS,
Attorneys for Appellant.

146 And afterwards, to wit, on the 26th day of June, 1894, the further following proceedings were had in said cause, viz:

CELESTINE PIM, App.,
vs.
CITY OF ST. LOUIS *et al.*, Resp.

Now, at this day, the court, having fully considered and understood the motions heretofore filed for a rehearing herein and to transfer this cause to the court in banc, doth order that said motions be, and the same are hereby, denied.

And afterwards, to wit, on the 15th day of September, 1894, the further following proceedings were had in said cause, viz:

CELESTINE PIM, Appellant,
vs.
THE CITY OF ST. LOUIS and THE ST. LOUIS SECTIONAL DOCK COMPANY, Respondents.

Now, on the 15th day of September, 1894, there was presented to the Honorable James B. Gantt, presiding judge of division No. 2 of the supreme court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States on the third day of October, 1894, and a bond in the sum of one thousand dollars; which said writ of error was allowed, said citation signed, and said bond approved and made a part of the record herein.

Which said bond is in words and figures as follows, to wit:

147 Know all men by these presents that we, Celestine Pim, as principal, and Leverett Bell and George J. Davis, as sureties, are held and firmly bound unto The City of St. Louis and The St. Louis Sectional Dock Company in the full and just sum of one thousand dollars, to be paid to the said The City of St. Louis and The St. Louis Sectional Dock Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the April term, A. D. 1894, of the supreme —

of Missouri, in a suit depending in said court between Celestine Pim, plaintiff in error, and The City of St. Louis and The St. Louis Sectional Dock Company, defendants in error, judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of St. Louis and The St. Louis Sectional Dock Company, citing and admonishing them to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., on the third day of October next:

Now, the condition of the above obligation is such that if the said Celestine Pim, the said plaintiff in error, shall prosecute said writ to effect and answer all damages and costs if she fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

CELESTINE PIM. [SEAL.]
LEVERETT BELL. [SEAL.]
GEO. J. DAVIS. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
J. B. GANTT,
Presiding Judge.

148 UNITED STATES OF AMERICA, } *sct:*
Western District of Missouri, }

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine. I further certify that said bond is good and sufficient.

Witness my hand this 10th day of Sept., 1894.

W. C. MARSHALL,
Att'y for Def't in Error.

(Endorsed:) No. —. Supreme court of Missouri. Celestine Pim, pl'ff in error, *vs.* The City of St. Louis and The St. Louis Sectional Dock Company, def'ts in error. Appeal bond, $—. Dated — day of ——, 187–. Filed 15th day of September, 1894. Jno. R. Green, clerk.

149 STATE OF MISSOURI, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings had and made by this court in the above-entitled cause as fully and complete as the same appears of record and on file in this office.

Seal of the Supreme Court of Missouri.

In testimony whereof I have hereunto set my hand and affixed the seal of said court. Done at office this 20th day of September, A. D. 1894.

JNO. R. GREEN,
Clerk Supreme Court.

Endorsed on cover: Case No. 15,705. Missouri supreme court. Term No., 180. Celestine Pim, plaintiff in error, *vs.* The City of St. Louis and The St. Louis Sectional Dock Company. Filed October 13, 1894.

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OCT 17 1896
JAMES H. McKENNEY,
CLERK.

165-273.

Supreme Court of the United States.

OCTOBER TERM, 1896.

CELESTINE PIM,
PLAINTIFF IN ERROR,
vs.
THE CITY OF ST LOUIS AND THE ST. LOUIS SECTIONAL DOCK COMPANY,
DEFENDANTS IN ERROR.
No. 180.

In Error to the Supreme Court of the State of Missouri.

Statement, Brief and Argument for Plaintiff in Error, by Leverett Bell and Henry B. Davis, of Counsel.

Questions. 1. Has this court jurisdiction to review the decision of the supreme court of Missouri?

2. Has the judgment below deprived plaintiff in error of property without due process of law?

W. J. Keil, 217 Olive street.

Seal of the Supreme Court of Missouri.

In testimony whereof I have hereunto set my hand and affixed the seal of said court. Done at office this 20th day of September, A. D. 1894.

JNO. R. GREEN,
Clerk Supreme Court.

Endorsed on cover: Case No. 15,705. Missouri supreme court. Term No., 180. Celestine Pim, plaintiff in error, *vs.* The City of St. Louis and The St. Louis Sectional Dock Company. Filed October 13, 1894.

165-273

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Supreme Court of the United States.

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vs.
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DEFENDANTS IN ERROR.

No. 180.

In Error to the Supreme Court of the State of Missouri.

Statement, Brief and Argument for Plaintiff in Error.

STATEMENT.

This is an action of ejectment, instituted on January 15, 1892, in the state circuit court at St.

Louis, Missouri, to recover an undivided one half interest in premises located in said city and state. Printed record, p. 4. The trial in said circuit court resulted in a judgment against the plaintiff below, who is the plaintiff in error here. Id. p. 8. Thereupon said plaintiff appealed to the supreme court of the state, Id. p. 8, where the judgment was affirmed on June 12, 1894. Id. p. 74. By writ of error sued out on September 4, 1894, the case is before this court. Id. p. 1.

The printed record contains a mass of matter which it will be unnecessary to allude to, as the only question, it is conceived, that can be considered here aside from the question of jurisdiction, is whether the statute of limitations of Missouri applicable to real actions, as applied by the state courts in this case, is in contravention of the fourteenth amendment of the constitution of the United States.

The question arises in the following manner. The father of plaintiff, one Honore Picotte, held the title to the premises sued for, at and prior to his death, which occurred in 1860. By his last will, duly probated, he devised all of his property including said premises to his wife during her life, with remainder in fee, to his surviving children, two in number, of whom plaintiff in error is one. Id. p. 18. The defendants in error set up in the state courts title in themselves by adverse possession for the period of ten years commencing in 1858, two years before the death of the father. Id. p. 5. The life estate terminated in 1869, on the death of the widow. Id. 18. The plaintiff was a married

woman from 1865 to 1888. Id. 18. She instituted this action in 1892. Id. p. 4. The value of the premises is $40,000. Id. p. 18.

The state courts, circuit and supreme, held and decided that if defendants in error took possession of the property in 1858, during the life time of the father and held the same adversely and continuously for ten consecutive years, they acquired title thereto by virtue of the state statute of limitations. Id. pp. 72, 78. The effect of this proposition is that the title and ownership of the property, under the possession of 1858, vested in defendants in 1868, as against the plaintiff whose right to possession of her estate in remainder, did not commence until 1869; or, in other words, the plaintiff's estate, a vested remainder in fee, was barred by adverse possession, during a period when the life estate was in existence and when plaintiff was not entitled to the possession of the property, nor entitled to maintain an action to recover possession of the same, and prior to the time she was entitled to the possession of the estate in fee in remainder, upon the happening of the death of the life tenant.

In 1869, upon the death of the life tenant, the plaintiff for the first time became entitled to the possession of the property. She was then a married woman, under the disability of coverture, and under the law of Missouri could maintain no action to recover the property prior to the death of her husband in 1888.

The judgment below is, in effect, that a complete title to the property had been transferred to the

defendants by adverse possession as early as 1868; and that plaintiff's estate in the property was transferred to defendants by adverse possession during the existence of the life estate when plaintiff was not permitted to sue for the same in the courts of the land.

It will be argued here on her behalf that plaintiff in error was deprived of property without due process of law; and that the statute that deprived her of property for failing to sue for it during a period when she had no right to the possession, and could not therefore maintain an action for such possession, is plainly unconstitutional.

The error assigned is that the supreme court of Missouri, by its judgment has deprived plaintiff in error of property without due process of law and contrary to the fourteenth amendment of the constitution of the United States.

The questions for consideration are:

1. Has this court jurisdiction to review the decision of the supreme court of Missouri?

2. Has the judgment below deprived plaintiff in error of property without due process of law?

BRIEF.

1. The jurisdiction of this court over this case cannot be denied. Pim v. St. Louis, 122 Mo. 654; Dibble v. Bellingham, 163 U. S. 63; Sayward v. Denny, 158 U. S. 180; Huntington v. Attrill, 146 U. S. 657; Scott v. McNeal, 154 U. S. 34; Marchant v. Railroad, 153 U. S. 380.

2. The judgment below operates to deprive plaintiff of property without due process of law. Fulkerson v. Mitchell, 82 Mo. 13; Rust v. Goff, 94 Mo. 511; 2 Rev. Stat. of Mo. of 1889, p. 1586; Byrns v. France, 131 Mo. 639; Pim v. St. Louis, 122 Mo. 654; 1 Wood on Lim., Sec. 6; Bauserman v. Blunt, 147 U. S. 647; Balkam v. Iron Co , 154 U. S. 177; Scott v. McNeal, 154 U. S. 34; Black's Const. Law, 443; Cooley's Const. Lim. 6th Ed. 449.

ARGUMENT.

1. The jurisdiction of this court to consider the questions arising on this record is predicated on the fourteenth amendment of the constitution of the United States which forbids any state from depriving any person of property without due process of law. The opinion of the supreme court of Missouri herein is set forth at page 75 of the printed record. It is reported as Pim v. St. Louis, 122 Mo. 654. At page 657 of the official report and page 75 of the printed record, said opinion proceeds as follows: "In 1786, Jos. Brazeau obtained a concession of a tract of ten arpens from north to south, bounded on the east by the Mississippi river. In 1799, he obtained a second concession. The concession was confirmed by act of congress in 1836. Plaintiff showed a derivative title from Jos. Brazeau for the land sued for, known as the Picotte tract, the north and south lines of which, if extended eastwardly to the west bank of the Mississippi river as now defined, would include said land. It is further shown that Honore Picotte owned lot 2 at the time of his death in 1860; that his wife died in 1869; that two children of said marriage survived their parents, of whom plaintiff is one, and her sister, a Mrs. Wilkinson, is the other; that plaintiff was married in 1865 to Dr. L. T. Pim, who died in 1888. The will of Honore Picotte was

introduced in evidence by which all of his property, real and personal, was devised to his wife for life, with remainder in fee to the plaintiff and her sister, Mrs. Wilkinson."

At page 664 of the report, 78 of the printed record, it appears that the trial court gave instructions 5 and 6 to the jury which were approved by the supreme court and which instructions are as follows:—

"5. The court instructs the jury that if they believe from the evidence that the defendant St. Louis sectional dock company, during the life time of Honore Picotte, entered upon the land sued for and actually and wholly occupied the same in their business, and from the time of said first occupation so occupied the same continuously for ten consecutive years, holding the same throughout such period openly, peaceably, exclusively and adversely to all persons, claiming it in good faith as their own or as tenants of the defendant, the city of St. Louis, then the defendants have acquired title thereto by the statute of limitations, and you will find for the defendants."

"6. The court instructs the jury that if they believe from the evidence that the possession of the city, through the sectional dock company, began during the lifetime of Honore Picotte, and was open, adverse, continuous and notorious, as described in the other instructions given, then the subsequent death of said Picotte during the minority

or coverture of the plaintiff herein, did not have the effect of stopping the running of the statute of limitations, and if such possession of the city continued ten years before the institution of this suit, then the verdict must be for the defendants."

At page 665 of the report, 79 of the printed record, speaking of the above instructions, the court say: "It is claimed by counsel for plaintiff that her cause of action was not barred by the statute of limitations at the time of the commencement of this suit, and that it did not begin to run against her until the death of her husband, Dr. Pim, which occurred in 1888. If there was no actual possession taken of the land until after her marriage to her husband, in 1865, her action was not barred, because it was brought within ten years after his death. Bradley v. Railroad, 91 Mo. 493; Dyer v. Witler, 89 Mo. 81. The statute did not run against her during her coverture unless possession was taken before her marriage, although the title in fee was vested in her. But the evidence tends to show that possession was taken by defendant city in 1858, during the life time of Honore Picotte, plaintiff's father, and from whom she acquired whatever title she had by devise to which the land here sued for had accreted. The evidence was ample upon which to predicate the instructions given for defendant upon that theory of the case. As the statute of limitations began to run against plaintiff's father, it continued to run against her, notwithstanding she may have been under some statutory disability during a

portion or all of the time. Rogers v. Brown, 61 Mo. 187; Cunningham v. Snow, 82 Mo. 587." * * * "If the plaintiff's cause of action was barred by the statute of limitations, as the jury must have found under the facts and instructions of the court, it is of no consequence that the land in controversy may have accreted to that which plaintiff acquired from her father by will." In accordance with the above views, the judgment against plaintiff in error was affirmed.

The plaintiff in error in due time moved for a rehearing on the ground that the judgment violated the fourteenth amendment to the constitution of the United States. Id. p. 81. The motion was overruled. Id. p. 82. Thereupon this writ of error was sued out. Id. p. 1.

The first question is, has this court jurisdiction to review the decision of the supreme court of Missouri?

It is understood that ordinarily this court will follow the construction given by the supreme court of a state to a statute of limitations of a state. Dibble v. Bellingham, 163 U. S. 63.

The power of a state to enact a statute of limitations does not however extend to taking the property of one person and arbitrarily giving it to another. The question on this record is whether the supreme court of Missouri correctly construed and applied the statute of limitations of that state to the facts of this case, and if so, is the statute constitutional? The main point is does the judgment below operate to deprive plaintiff of property without due process of

law? The plaintiff assails the judgment and alleges that it deprived her of the protection extended to all property by the fourteenth amendment of the constitution of the United States, and that the above effect was accomplished by a statute of limitations of Missouri as construed and enforced by the supreme court of that state. The ruling of the Missouri court on that statute is, necessarily, as a matter of statutory construction, either right or wrong. The effect on plaintiff's constitutional rights, if the judgment stands, is the same whether the ruling is right or wrong. In either event her constitutional rights are impaired, and it is no answer to say that this is accomplished by a correct exposition of a statute by a state court. A state cannot by its judicial, legislative or executive power deprive one of property without due process of law. It cannot lawfully enact a statute of limitations, under which one is barred by a failure to sue, during a period when one is forbidden to sue. The case here is the same as if the Missouri statute had expressed in direct terms, the meaning and effect given to it by the state court. It is therefore, in this sense, the statute itself as well as the judgment of the court below that is on trial. One of the questions to be answered is whether the statute, in its application to estates in remainder, is in harmony with the Federal constitution?

If this question can fairly be averred on the record, then jurisdiction is in this court to determine whether the judgment below is open to the above objection; provided, the proper steps were taken in

the court below to present the question here. And as to this matter, it is conceded that the question was first raised in the supreme court of Missouri by a petition for a rehearing after judgment, and this would seem to be insufficient under Sayward v. Denny, 158 U. S. 180, and other cases to the same effect, were it not for three cases, namely, Huntington v. Attrill, 146 U. S. 657, Marchant v. Railroad, 153 U. S. 380, and Scott v. McNeal, 154 U. S. 34, which it is believed have established an exception to the rule announced in the Sayward case. In Huntington v. Attrill, jurisdiction was maintained of a writ of error to a state court, it appearing that the decision below denied full faith and credit to the judgment of a court of another state, although such claim was not distinctly made in any formal manner, by the plaintiff in error, in the state court. In Marchant v. Railroad, jurisdiction of a writ of error to a state court was taken and the question decided whether the judgment below deprived plaintiff of property without due process of law, on a mere specification of error on the record, in this court, to that effect. In Scott v. McNeal, the fourteenth amendment of the constitution of the United States was not set up nor relied on in the state court save by way of argument in the state supreme court and notwithstanding this fact, a writ of error from this court brought up the record and the judgment of the state court was reversed on the distinct and only ground that it deprived plaintiff of property without due process of law. At page 45 the court said: "The fourteenth arti-

cle of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities."

It was under authority of the three cases named that the plaintiff in error sued out the writ of error herein and it is submitted that in the light of these decisions, the jurisdiction of this court in the premises, cannot be denied.

It is the rule of this court that on error to a state court, if the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution of the United States, and another question not Federal has also been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question to sustain the decision, this court will not review the judgment. An examination of the record will show that the case here, does not come under the operation of the above rule. The action is ejectment. The property in controversy fronts on the Mississippi river, in the city of St. Louis. The title commences with a Spanish concession made in 1786 to one Joseph Brazeau of a tract of land on said river and on territory now within said city, which concession was confirmed by act of congress in

1836; and the title proceeds by regular conveyances and inheritance until a one half interest in the particular lot sued for, which lot was created by accretion to the ground embraced in said concession, was at and before the institution of the suit, vested in plaintiff. The defendants exhibited no title to the premises except by adverse possession. The only question discussed by the state supreme court is the effect of the adverse possession. Many pages of the record are occupied with rehearsing plaintiff's title and setting forth the history of the river bank and the recession of the water eastwardly by which means the ground in controversy became dry ground, but none of these matters were issues in the case and the only point decided by the supreme court of Missouri involved the question of title by adverse possession in defendants under a statute, which, if it has the meaning the state court ascribed to it, is unconstitutional as being in conflict with the fourteenth amendment. The judgment rests on this ground and on no other ground; it therefore presents a judgment that will be reviewed here. The opinion of the state supreme court in this case forms a part of the record upon which action is taken here. Sayward v. Denny, 158 U. S. 180.

2. The second question involves the inquiry whether plaintiff in error, has by the judgment below, been deprived of property without due process of law; or, otherwise expressed, is the state statute of limitations of Missouri, as the same is administered by the courts of that state, an infringement

of the Federal constitution which prohibits a state from depriving any person of property without due process of law.

In Missouri the law is that adverse possession of land for ten years except as against the government and parties laboring under disabilities, will not only bar a recovery by the true owner, but it will extinguish his title and confer it upon the adverse occupant, under which he may maintain ejectment. The operation of the statute takes away the title of the real owner and transfers it to the adverse occupant. The party who acquires a title to land under the statute by possession adverse to the true owner, acquires all the title of the true owner, precisely as if he had a deed from him. Fulkerson v. Mitchell, 82 Mo. 13.

It is also the law of Missouri that the husband is entitled to the possession of the wife's fee simple lands, and he is the proper and only party in a suit for lands claimed to belong to her. Rust v. Goff, 94 Mo. 511.

In the present case, Honore Picotte, the father of plaintiff, was the owner of the premises in his lifetime, and up to his death in 1860. The adverse possession commenced in 1858. It had not ripened into a title at the date of the death of Mr. Picotte. Under the will of Mr. Picotte, a life estate was created in favor of his wife with remainder in fee in his two surviving children, of whom plaintiff is one. In 1868 the ten years' adverse possession was completed. In 1869, the life estate terminated upon the death of the widow. At this time the plaintiff was

a married woman, having married in 1865, and continued to be a married woman until the death of her husband in 1888. The judgment below is that the plaintiff was barred in this action by the adverse possession, which terminated in 1868, during the existence of the life estate. In other words, the plaintiff was barred in 1868, although the life estate did not terminate until 1869.

The estate of plaintiff vested at the date of her father's death, and her interest in the property commenced at that time. Byrne v. France, 131 Mo. 639. Her possession was deferred until the expiration of the life estate. During the existence of the life estate, plaintiff could maintain no action to recover the property. The judgment below is that her estate and interest were transferred to defendants at the expiration of the ten years' possession in 1868, notwithstanding that at no point of time in 1868 or anterior thereto, could plaintiff maintain an action for the possession of the premises. This is tantamount to taking the property of plaintiff and giving it to defendants.

Laying out of view the fact plaintiff was a married woman from 1865 to 1888 and the effect of her coverture, the court said she was barred in 1868 during the existence of the life estate. Although the plaintiff owned a vested estate in remainder in fee, she was not entitled to possession until the termination of the life estate in 1869. Ejectment is a possessory action. Plaintiff, if unmarried, could not maintain it until 1869 when her right to possession commenced. There was no

action she could commence or maintain during the existence of the life estate. She was bound hand and foot. On the one hand, the defendants were acquiring a title by possession which would unless contested become absolute in 1868, and on the other, no court or remedy was open to plaintiff to contest the same. She had no standing in court, no legal remedy, prior to 1869, and yet according to the judgment below, her rights and estate were transferred to defendants in 1868 as fully and completely as if she had made a valid transfer of the same by deed to the defendants in that year.

The statute of limitations of Missouri upon which this judgment is based, is printed in 2 Rev. Stat. of Mo. of 1889, p. 1586, and is as follows:

"Sec. 6764. No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action."

"Sec. 6767. If any person entitled to commence any action in this article specified or to make any entry be, at the time such right or title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on any criminal

charge or in execution upon some conviction of a criminal offense for any time less than life, or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such action or the making such entry; but such person may bring such action or make such entry after the time so limited and within three years after such disability is removed; provided, that no such action shall be commenced, had, or maintained or entry made by any person laboring under the disabilities specified in this section, after twenty-four years after the cause of such action or right of entry shall have accrued."

In 1869 when the life estate terminated, plaintiff was a married woman and continued to be a married woman during the life of her husband and until his death in 1888. She instituted the present action in 1892, four years after her husband's death and twenty-three years after the right of action accrued. The court below held that the action was in time, but for the fact that possession was taken in the lifetime of plaintiff's father. Pim v. St. Louis, 122 Mo. at p. 665; page 79 printed record.

As has been heretofore said, the point is not only whether the supreme court of Missouri, correctly construed and applied the state statute of limitations to the facts of this case, but, conceding for the moment that it did, is the statute a constitutional enactment? Does it contravene the fourteenth amendment? The record presents a twofold ques-

tion. And, if the judgment stands, the effect is the same whether the decision below is right or wrong, and whether the limitation act is or is not open to constitutional objection.

The judgment takes the property of plaintiff and gives it to the defendants. A failure to sue during a period when she was forbidden by law to maintain an action, operated in the present case to transfer plaintiff's estate to another.

The general doctrine is, that time when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event which is not within the saving of the statute, subject to the exception that the statute does not run during a period of civil war as to matters of controversy between citizens of opposing beligerents. 1 Wood on Lim. sec. 6.

When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue. Bauserman v. Blunt, 147 U. S. 647. This is said to be the rule in the absence of express statute or controlling adjudication to the contrary.

The above rule was applied by the court below to the present case and the result produced was that an estate in remainder was held to be absolutely barred by a possession commenced in the life time of the ancestor and terminated during the period of the life estate, and which possession the remainder man had no opportunity to contest. The estate in remainder under the operation of the rule was destroyed by the non-action of the life tenant, and property worth

$40,000, passed to a stranger in possession without any act of commission or omission on the part of the true owner. The rule, in its application to this case, conflicts with the constitutional rights of the owner of the fee in the remainder, and should be denied application.

In the case of Balkam v. Woodstock Iron Co., 154 U. S. 177, at p. 189, speaking of estates in remainder, it is said: "It may be that, if the question were before us for original consideration, we should hold that the right of the heirs to sue did not arise until after the death of the holder of the life estate, and therefore, that the bar of the statute would only then begin to run; but we are not at liberty to pass upon that question. When the bar of the statute of prescription, under the laws and decisions of the state of Alabama, began to be operative has been construed by the court of last resort of that state. Necessarily the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whether legal or equitable. Those questions were purely within the province of the supreme court of Alabama, In deciding them it passed upon its own statute of limitations or the doctrines of prescription as applied by it, and we are obliged to apply and enforce their conclusions."

The above language carries the implication that if the question were properly before this court, it would be held and decided that limitation does not

run against a remainder man, during the existence of a life estate.

Notwithstanding the statement in the Balkam case of the rule requiring this court to follow the decision of a state court on a state statute of limitation, it is contended here on behalf of plaintiff in error that if it fairly appears that the decision of a state court on a state statute is destructive of property rights to such an extent that it can be said that the property is taken without due process of law, the jurisdiction of this court to reverse the judgment is complete, and will be exercised irrespective of and without regard to the interpretation of the state law by the state court. Scott v. McNeal, 154 U. S. 34. The protection of the Federal constitution extends to a case of the above character, and the rule that this court will apply and enforce the conclusions of the state court falls away and disappears from view.

Of what value is an estate in remainder if it can be destroyed by the omission of the life tenant to contest an adverse possession? Does limitation run against the remainderman during the existence of the life estate? The fact that the adverse possession in the present case commenced in the lifetime of the ancestor does not mitigate the evil inflicted on the remainderman. Under the doctrine of the Missouri court the result would have been the same, in a case where the adverse possession commenced during the existence of the life estate and continued ten years during the life of the life estate. The proposition that one can be deprived of an estate for failure to

sue during a period when he is given no action, is fundamentally wrong.

In Black's Const. Law, p. 433, it is said: "any statute of limitation must afford an opportunity to bring an action within a reasonable time. Rights cannot be cut off arbitrarily."

In Cooley's Const. Lim., 6th ed., p. 449, it is said: "all statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity; if it should attempt to do so, it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions."

A state cannot, by the enactment of its legislature or by the judgment of its courts, deprive one of property without due process of law. If the attempt is made, it will be corrected here. There is nothing in a state statute of limitation, exempting it from this rule. In common with all other state legislation, it must not infringe on the fourteenth amendment.

In the present case if the state court correctly interpreted the state statute, the statute is unconstitutional, because it contravenes the fourteenth amendment. If, on the other hand, the statute will not bear the construction placed on it by the state court, the judgment below is error, for the same reason. In either event, if the judgment is permitted to stand, the plaintiff in error is deprived of property without due process of law.

A case is therefore presented within the jurisdiction of this court, and whether the one view or the other prevails here, it follows, it is respectfully submitted, that the judgment below must be reversed and the cause remanded.

LEVERETT BELL
AND HENRY B. DAVIS,
for Plaintiff in Error.

Supreme Court, U. S.
FILED.
JAN 25 1897
JAMES H. McKENNEY,
CLERK.

165-273.

Supreme Court of the United States.

OCTOBER TERM, 1896.

CELESTINE PIM,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS AND THE ST. LOUIS SECTIONAL DOCK CO.,
Defendants in Error.

No. 180.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR, BY W. C. MARSHALL, COUNSEL.

POINTS RELIED ON BY DEFENDANT IN ERROR.

I. There is no federal question involved in this case.

II. The plaintiff in error did not raise any federal question in the State courts at the proper time and in a proper manner.

III. The City of St. Louis has a perfect title, by limitation, to the premises in controversy.

CENTRAL LAW JOURNAL CO., ST. LOUIS.

Supreme Court of the United States.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR, BY W. C. MARSHALL, COUNSEL.

STATEMENT.

This is a suit in ejectment, instituted in the Circuit Court of the City of St. Louis on the 15th of January, 1892, to recover possession of an undivided one-half interest in a strip of land in the City of St. Louis, lying in front of block 868 of said city, and between it and the Mississippi river, bounded on the east by the river, on the west by

the east line of block 868, on the south by the north line of Trudeau street, produced to the river, and on the north by the south line of Russell avenue, produced to the river, having a width from east to west of about three hundred feet and six inches, and also to recover $10,000 damages for the detention of the property, and $300 per month for the monthly value. The property in question constitutes a part of the wharf of the City of St. Louis. The answer of the defendant, the City of St. Louis, is a general denial and a plea of the statute of limitations, and, further, a plea of adverse possession since 1858. (Rec., pp. 4 and 5.) Thereupon the case was tried in the Circuit Court of the City of St. Louis, beginning on the 25th of April and ending on the 28th of April, 1892, resulting in a verdict for the defendants. (Rec., pp. 6 and 7.) The plaintiff appealed to the Supreme Court of Missouri, where the judgment of the Circuit Court was, on the 12th of June, 1894, affirmed, the court rendering the following opinion therein:

"In the Supreme Court of Missouri, Division No. 2, April Term, 1894.

Celestine Pim,
Appellant,
v.
The City of St. Louis *et al.*,
Respondents.

Ejectment for the possession of an undivided one-half interest in a lot of land in front of block 868 of the City of St. Louis and between it and Mississippi river, bounded east by said river, west by the east line of block 868, south by the north line of Trudeau street produced to the river, and north by the south

line of Russell avenue produced to the river, and having a width from east to west of about 300 feet and a length from north to south of about 346 feet and six inches. The city answered first, by general denial; second, claiming adverse possession since 1868 and a plea of the statute of limitations. Plaintiff, by way of reply, denied all the allegations in the answer. The St. Louis Sectional Dock Company made no appearance, and judgment by default was rendered against it on February 4, 1892. Upon a trial by a jury there was a verdict and judgment for the defendant, from which plaintiff appealed to this court. In 1786 Jos. Brazeau obtained a concession of a tract of ten arpens from north to south, bounded on the east by the Mississippi river. In 1799 he obtained a second concession. The concession was confirmed by Act of Congress in 1836. Plaintiff showed a derivative title from Jos. Brazeau for the land sued for, known as the Picotte tract, the north and south line of which, if extended eastwardly to the west bank of the Mississippi river as now defined, would include said land. It is further shown that Honore Picotte owned lot 2 at the time of his death, in 1860; that his wife died in 1869; that two children of said marriage survived their parents, of whom plaintiff is one, and her sister, a Mrs. Wilkinson, is the other; that plaintiff was married in 1865 to Dr. L. T. Pim, who died in 1888. The will of Honore Picotte was introduced in evidence, by which all of his property, real and personal, was devised to his wife for life, with remainder in fee to the plaintiff and her sister, Mrs. Wilkinson. The Brazeau tract is embraced in U. S. survey 3078, and plaintiff claims that the land in controversy is an accretion to that survey, and par-

ticularly to lot 2. Upon the other hand, defendant claims that it is not an accretion; that it was formed by the city permitting the Iron Mountain Railroad Company to construct a trestle in the river in front of said survey, and thereafter by the railroad company and the city and the Sectional Dock Company, as the lessee of the city, filling up where the trestle ran, and finally filling the low ground between the embankment thus formed and what was known as Duncan's island. In 1835 the main channel of the river as shown by said survey was between Duncan's island and the Missouri shore. The land sued for lies east of the channel, as it was at that time. By filling up, Main street has been built in front of what was the eastern boundary of said survey, and the wharf has been created in part by filling done by defendant, and partly by taking in Duncan's island. From 1870 to January 1, 1889, the Sectional Dock Company occupied the premises as the lessee of defendant city. There was also evidence that in 1884 the City of St. Louis rented the premises to the St. Louis Sectional Dock Company.

In 1884 the city, by ordinance, granted permission to the St. Louis Transfer Railway Company to lay its tracks along the property. An amended franchise for the same purpose was granted said St. Louis Transfer Railway Company in 1885.

On the 17th day of June, 1870, plaintiff and her sister, Mrs. Wilkinson, by a deed in partition, divided block 868, and described it as follows in the fifth paragraph of the deed: "The north half of block 868 of said City of St, Louis, bounded east by the wharf, west by Main street, north by Picotte street, and south by the balance of the block," and by paragraph six bounded the southern half of the

block in the same way, the northern half being partitioned to Mrs. Wilkinson, and the southern half to Mrs. Pim.

The city showed by Thomas P. Morse that he had known the property in controversy intimately since June or July, 1858, and had seen it every day except during the years 1869 to 1873; that in 1858 it was about two blocks from where the river was then to where it is now—that is, two blocks have been added since; that the city first constructed dykes from the mainland to Duncan's island, and subsequently filled in between the dykes, thus connecting Duncan's island with the mainland; that the Sectional Dock Company built houses or buildings on the property in 1864; that in 1858 the Sectional Dock Company built houses or buildings partly in front of block 868, and partly further north; that the company used the property from 1858 to 1864, and then bought an old machine shop which had been erected in 1859 partly in front of block 868; that it was subject to overflow in an ordinary stage of water, and that the Sectional Dock Company built cribs for the purpose of keeping their lumber above the water; that at that time Kosciusko street was the nearest street to the water's edge (Kosciusko street is the next block west of Main street); that from 1858 to 1864 the office of the Sectional Dock Company was on the lower part of Duncan's island; that from Lesperance street to Barton street in 1858 the river was from 100 to 200 feet wide between the Missouri shore and Duncan's island; that a portion was not filled until the Iron Mountain Railroad commenced filling in 1882 to 1883, and was only completely filled a few years ago; that the city drove piling at Lesperance street, where an eddy was

forming, and which threatened to wash away what was originally part of survey 3078, and thereby prevented such washing, and the Iron Mountain Railroad hauled dirt and filled up the slough; that the old machine shop which the Sectional Dock Company purchased was located between Russell avenue and Trudeau street; that the Sectional Dock Company had been paying rent to the city for the property since 1858; that the city connected Duncan's island with the mainland by building dykes at Barton and at Lesperance streets, and then filled in between the dykes; that the Sectional Dock Company, under its lease from the city, piled lumber on block 868 in 1858, by building cribs to raise the lumber above the water, then filled up the slough between Duncan's island and the mainland.

The city showed by Henry Atkins, superintendent of the St. Louis Sectional Dock Company, that he had been connected with that company, beginning in 1856, and extending to the present time; that he knew Duncan's island in 1845 or 1846; that in 1845, in medium stage of water, the boats ran between the main shore and Duncan's island; that at the time the Iron Mountain trestle was built there was four, five or six feet of water between the island and the mainland; that the trestle extended from Lesperance street to Barton street; that the trestle was constructed about 100 feet from the east bank of the slough, and extended over the slough; that the filling was done by the Iron Mountain Railroad bringing dirt from Picot's Hill, in Carondelet, and filling up the slough, and by the Sectional Dock Company also doing filling; that the Sectional Dock Company has been in possession of this property since 1858 as lessee of the city.

August Rauschenbach testified that he had been in the employ of the city since 1854; that in 1865 he made a survey and location for the wharf lines south of Chouteau, extending as far south as Keokuk street; that at that time there was a slough between Picotte and Trudeau streets, and there were several frame buildings south of Lesperance street, near tht water's edge; about 11 feet 8 inches from the river bank was a machine shop 65 feet 6 inches, by 35 feet, that was used by the dock company at the time; then 60 feet from that there was a frame house, 32 feet 4 inches by 16 feet 3 inches; that was the office of the dry dock office; then 65 feet 6 inches further west was a frame stable; that the heavy red line on the map used to illustrate the location of the property and surroundings, hereto annexed, indicates the proposed east line of the wharf as fixed by ordinance 5403, passed in August, 1864, and the red line west of that indicates the west wharf line, 300 feet from the east line.

(Here follows map marked p. 136.)

George W. Ford testified that he had known Duncan's island since 1846, and that in 1846 he came up the river to St. Louis, and the boat passed between Duncan's island and the Missouri shore.

Mrs. Celestine Pim, being recalled on behalf of defendants, testified as follows:

Q. Will you please state to the jury the day of the month and the year you were born? A. May 3, 1842.

Q. Will you please state the day and the year and the month when you were married? A. The 6th of December, 1865.

At the instance of the plaintiff the court instructed the jury as follows:

1. "The court instructs the jury that the wharf condemnation proceedings read in evidence were void, and invested the City of St. Louis with no title or claim to the property sued for.

2. "If the jury find for the plaintiff, they will find that she is entitled to the possession of one undivided half of the premises, and damages for the detention thereof from January 15, 1892, to the present time, and the jury will state in their verdict the value of the monthly rents and profits of said one-half interest."

The following instructions were given on the part of the defendants:

1. "The court instructs the jury that an island in the Mississippi river is a body of land surrounded by water. If, therefore, they believe from the evidence that what was formerly called Duncan's island was, at the date of the deed from Papin to Honore Picotte, a body of land in the Mississippi river, separated from the main shore by a channel or slough through which water flowed, it was in fact an island, though at times when the river was below its ordinary low-water stage water ceased to flow through said channel or slough.

2. "The court instructs the jury that if it believes from the evidence that, at the date of the deed from H. Theodore Papin to Honore Picotte, what was formerly called Duncan's island was in reality an island, as defined in these instructions, and that it was situated directly east of the property described in said deed, and that the property sued for lies east of where the middle line of the said channel or slough which separated the island from the mainland was, and became attached to said

Duncan's island by accretion thereto, or was a part thereof, they will find for the defendants.

3. "If the jury believe from the evidence that, at the date of the partition deed to Papin, and of Papin to Honore Picotte, the lower end of Duncan's island lay above the north line of the property described in the deed from Papin to Honore Picotte on the main line extended eastwardly, and that the property in dispute is not an accretion to the said property described in said deed to Honore Picotte, but an accretion to said island, they will find for the defendants.

4. "The court instructs the jury that by the term accretion, herein used, is not meant filling done by the city, the Sectional Dock Company, or the Iron Mountain Railroad Company, but accretion means natural accumulations; and if the jury believe from the evidence, that the property here sued for was made by the city, the Sectional Dock Company, or the Iron Mountain Railroad Company filling up the slough between Duncan's island and the mainland of the Missouri shore, and not by natural accumulations, then their verdict must be for the defendants.

5. "The court instructs the jury that if they believe from the evidence that the defendant, St. Louis Sectional Dock Company, during the lifetime of Honore Picotte, entered upon the land sued for and actually and wholly occupied the same in their business, and from the time of said first occupation so occupied the same continuously for ten consecutive years, holding the same throughout such period openly, peaceably, exclusively and adversely to all persons, claiming it in good faith as their own, or

as tenants of the defendant, the City of St. Louis, then the defendants have acquired title thereto by the statute of limitations, and you will find for the defendants.

6. "The court instructs the jury that if they believe from the evidence, that the possession of the city through the Sectional Dock Company began during the lifetime of Honore Picotte, and was open, adverse, continuous and notorious, as described in the other instructions given, then the subsequent death of said Picotte during the minority or coverture of the plaintiff herein did not have the effect of stopping the running of the statute of limitations, and if such possession of the city continued ten years before the institution of this suit, then their verdict must be for the defendants.

7. "The jury are instructed that, in the instructions in reference to the defendants acquiring title to the property in dispute by the statute of limitations, it is not meant that every foot of said land must have been continuously occupied for ten years at all times, but that the occupation must have been of such a kind, evidenced by an enclosure or by visible token of possession, clearly defining the limits of possession, and calculated to give notice to the owner, and such that in itself excluded and was inconsistent with the possibility of any person at the same time occupying and using the land, or any part thereof, adversely to the defendants, and if the occupation was of such a nature it did not cease to be continuous, because by reason of changing piles of lumber, or otherwise, any particular spot thereof became temporarily vacant and unused, and that such adverse possession must be made out by clear and positive proof."

It is claimed by counsel for plaintiff that her cause of action was not barred by the statute of limitations at the time of the commencement of this suit, and that it did not begin to run against her until the death of her husband, Dr. Pim, which occurred in 1888. If there was no actual possession taken of the land until after marriage to her husband, in 1865, her action was not barred, because it was brought within ten years after his death.

Bradley v. Mo. Pac. Railway Company, 91 Mo. 493.

Dyer v. Wittler, 89 Mo. 81.

The statute did not run against her during her coverture unless possession was taken before her marriage, although the title in fee was vested in her; but the evidence tends to show that possession was taken by defendant city in 1858, during the lifetime of Honore Picotte, plaintiff's father, and from whom she acquired whatever title she had by devise to which the land here sued for had accreted. The evidence was ample upon which to predicate the instructions given for defendants upon that theory of the case. As the statute of limitations began to run against the plaintiff's father, it continued to run against her, notwithstanding she may have been under some stautory disability during a portion or all the time.

Rogers v. Brown, 61 Mo. 187.

Cunningham v. Snow, 82 Mo. 587.

There is no material difference in the facts as disclosed by the record in this case, and the case of Wilkinson v. The St. Louis Sectional Dock Company, 102 Mo. 130, in which case the instructions 5 and 7, here complained of, were approved. The

plaintiff in that case was a sister of the plaintiff here, acquired her title from the same source, and one of the defendants here was the defendant in that. We think that case decisive of this, in so far as the question of the statute of limitations is concerned. Instruction No. 6, given for defendant, is in line with that decision.

If the plaintiff's cause of action was barred by the statute of limitations, as the jury must have found under the facts and instructions of the court, it is of no consequence that the land in controversy may have accreted to that which plaintiff acquired from her father by will.

It is further contended that there was no proof of the existence of Duncan's island in 1835, and that for that reason there was no proof upon which to predicate defendants' 1, 2 and 3 instructions, and they should not have been given. This contention is not borne out by the record, as the plat therein shows that Duncan's island was surveyed by the surveyor-general in 1835. This objection is not, therefore, well taken.

The plaintiff insists that there was an interlocutory judgment rendered by default against the dock company on February 4, 1892, which was not set aside, and on July 18, 1892, a judgment in favor of the dock company on the trial, that she is entitled to judgment against the dock company on the record. This contention seems somewhat technical, and would not justify a reversal of the judgment upon the ground alone.

Section 2100, R. S., reads as follows:

"The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial

rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

We are not prepared to say that the substantial rights of the plaintiff were affected by the failure to set aside the interlocutory judgment in favor of the plaintiff, even if it had not been done.

But, nothing to the contrary appearing on the record, it will be presumed that the interlocutory judgment was set aside before the final judgment was rendered.

Blair v. Chicago & Alton Ry. Co., 89 Mo. 383.

The judgment should be affirmed. It is so ordered. All of this division concur.

G. D. BURGESS, J.

Thereafter plaintiff filed a motion for rehearing, alleging that under the decision of the Supreme Court of Missouri, as applied to the facts in this case, "a married woman is deprived of her property for failure to sue for it during the lifetime of her husband, when during all that time she had no right to the possession of it, and could not therefore maintain an action for such possession under the law and statutes of Missouri, which decision violates section 30, of article 2, of the State Constitution of Missouri, which provides that no person shall be deprived of property without due process of law; and it also violates section 10, of article 1, of the Constitution of the United States, that provides that no State shall pass any law impairing the obligation of contracts; and also the fifth amendment of said constitution, providing that no person shall be deprived of property without due process of law;

and also the fourteenth amendment to said constitution, providing that no State shall deprive any person of property without due process of law, and through the inadvertence of counsel the attention of the court was not called to the above view of the case."

Plaintiff also filed a motion to transfer the case from Division No. 2 of the court to the court *in banc*, on the ground that the case involved a federal question. (Rec., p. 81.) The Supreme Court of Missouri denied both motions, whereupon the plaintiff sued out a writ of error to this court, and has filed the following assignment of errors:

ASSIGNMENT OF ERRORS.

"The undersigned attorneys for the plaintiff in error in said case respectfully represent that in the above entitled cause, wherein the said Supreme Court of the State of Missouri gave judgment for the aforesaid defendants, the court committed errors in this:

"1. That said court erroneously deprived plaintiff, by its judgment, of her property without due process of law, and contrary to the fourteenth amendment of the Constitution of the United States.

"2. That said court erroneously held and decided as to an estate in fee in remainder in certain real premises herein sued for, which devolved on the plaintiff in the year 1869, on the happening of the death of the owner of the life estate in said premises; that the same was barred by ten years' adverse possession, commencing in 1858, during the lifetime of the grantor of said estates for life and in remainder, and prior to his death, which occurred

in 1860, and which period of ten years terminated in 1868, during the existence of the life estate prior to the time when the estate in fee in remainder vested in plaintiff.

"3. That said court erroneously held and decided that a statute of limitations of the State of Missouri took effect so as to bar plaintiff's cause of action by an adverse possession of ten years, during which period the plaintiff was disabled from maintaining an action to recover the premises in controversy by the fact that she was not entitled to the possession of said premises during the life of the owner of the life estate therein.

"4. That said court erroneously gave judgment in said cause for the defendants, whereas judgment should have been given for the plaintiff." (Printed Rec., p. 3.)

Facts.

The chronological history of the facts in this case is as follows:

1. Plaintiff claims title under Joseph Brazeau, to whom, on November 20th, 1786, a concession was made by Francis Cruzat, Lieutenant-Governor of Upper Louisiana, of a tract of ground on the west bank of the Mississippi river of ten arpens from north to south, and bounded west by the main road leading to Carondelet. This concession was augmented by a second concession made by Carlos Dehault Delassus, Lieutenant-Governor, etc., on November 19, 1799, to Brazeau, on the petition of the latter, of a tract of land, including the foregoing concession and in augmentation of it, of 12 arpens in front by 30 arpens in depth from the Mississippi river, with directions to Soulard, surveyor of Upper

Louisiana, to survey and plat both of said concessions and deliver the same to said Brazeau. The survey and plat of said concessions for said Brazeau were executed by Mackey, deputy surveyor, May 20th, 1803, and approved by Soulard, surveyor-general, August 21st, 1803, and the said survey and plat bounded the land on the east by the Mississippi river. The board of commissioners for adjusting titles for lands in Missouri began their action on this claim of 360 arpens on July 19th, 1806, when it was ascertained that it conflicted with the common, and no decision was nade. Further action was had August 19th, 1811, when it was rejected. On August 14th, 1833, it was before the board and evidence in regard to it was taken, and on November 11th, 1833, it was confirmed to Brazeau or his legal representatives, according the concessions, and was reported by the commissioners to the commissioner of the general land office, and by him reported to Congress and confirmed by an Act of Congress approved July 14th, 1836, entitled "An Act confirming claims to lands in the State of Missouri, and for other purposes.

2. Brazeau acquired from Benito Vasquez, by deed of May 26th, 1800, a strip of two arpens in front on the Mississippi river, running back to the Carondelet road, and lying immediately south of and adjoining the Brazeau tract.

3. Joseph Brazeau died November 22d, 1816, leaving a will which, after certain bequests of personal property, devised his estate to Marie Theresa Brazeau, his wife, for life, and after her death to Marie Brazeau, his niece, in fee.

4. After the date of the will, to-wit, in 1798, Marie Brazeau married Jean Baptiste Duchouquette.

There was a marriage contract between them, dated July 2d, 1798, and recorded April 12th, 1836, by which all the property owned by both was to be held in common between them.

5. By deed of February 14th, 1817, Marie Theresa Brazeau, widow of Joseph Brazeau, conveyed to Jean Baptiste Duchouquette and Marie, his wife, all her right and interest in the property devised to her by the will of her husband, Joseph Brazeau.

6. Marie Theresa Brazeau, widow of Joseph, died in 1834, and Marie Brazeau Duchouquette, niece of said Joseph Brazeau, and owner of the fee in common with her husband, died July 8th, 1818. Jean Baptiste Duchouquette died in 1834. Jean Baptiste Duchouquette, and Marie, his wife, had three sons and three daughters, all of which survived their parents, namely: 1, John B. Duchouquette; 2, Louis Duchouquette, who died in 1834, intestate and without issue; 3, Joseph Duchouquette; 4, Melanie Duchouquette, who married Theodore Papin, and died in 1834, leaving her husband and four children surviving her; 5, Theresa Duchouquette, who married Honore Picotte, and died in 1869; 6, Elizabeth Duchouquette, who married J. B. Lesperance and died leaving one son.

7. In 1834 partition proceedings were begun in the Circuit Court of the City of St. Louis between John B. Duchouquette and others, comprising the living children of Baptiste and Marie Duchouquette and the children of Mrs. Papin, who was dead, which resulted in the sale of the premises therein described, among others said concessions, which was confirmed by the court in 1835, and a deed, dated March 25th, 1836, was executed to Theodore Papin, a purchaser

at the sale, for a tract of land containing 83 and 94-100 of an acre.

8. By deed of Theodore Papin to Honore Picotte, dated June 1, 1835, a part of the tract conveyed by the commissioners in partition, being lot 2, as designated on the plat attached to said deed (see plat attached to Printed Rec., p. 10), and containing 16 and 45-100 acres, was sold by Papin to Honore Picotte. (Printed Rec., pp. 10, 11.)

9. In 1839 John B. Duchouquette, J. B. Lesperance and Theodore Papin made an addition to the City of St. Louis, of which lot 2 of the plat shown at p. 10 of the printed record constituted a part, and which embraced lots 1, 2, 3, 4 and 5, as shown on the Papin deed.

10. Honore Picotte died in 1860, and his wife died in 1869, leaving two children surviving them, to-wit: the plaintiff and her sister, Mrs. Wilkinson. (Printed Rec., p. 18.) The plaintiff, Mrs. Pim, was born May 3d, 1842, and married Dr. L. T. Pim on the 6th of December, 1865. (Printed Rec., p. 69.) Dr. Pim died in 1888. Honore Picotte, by will, devised all his property to his wife for life, and remainder in fee to the plaintiff and her sister. (Printed Rec., p. 18.)

11. The plaintiff showed the value of the premises sued for to be $40,000, and the monthly value of the rents and profits to be $200.

DEFENDANTS' CASE.

12. Ordinance 1805, approved February 6, 1847, declared Front street to be a part and portion of the wharf. (Printed Rec., p. 31.)

13. At the times of the concession and confirmation to Brazeau, and until after the year 1858, there

was an island in the Mississippi river, separated from the Missouri shore by a slough, which was navigable and used by boats at all seasons of the year, except in extreme low water, which extended from a point in front of what was the original City of St. Louis to a point opposite the Brazeau concession. (See map, p. 32, Printed Rec.) At that time the property now sued for was partly the bottom of the slough, and partly what was then Duncan's island. Prior to 1858 the city extended a dyke across the slough and across a portion of Duncan's island at Lesperance street, and also another dyke at Barton street, south of Lesperance street. (See plat, Printed Rec., p. 38.) In 1858 the property here in controversy was covered with the water of the slough at high water, and at low water was almost impassable. In 1858 the city leased to the Sectional Dock Company property extending from Lesperance street southward, as a place for the building of boats, and that company built cribs to pile lumber on to be used in boat building. The city also authorized the Iron Mountain Railroad to build a trestle along the line of Main street, which it did, and which was located in what was, in 1858, east of the thread of the channel of the slough dividing Duncan's island from the Missouri shore, and where Main street now is, and was over 300 feet east of the west boundary of the land here sued for. By reason of the dykes constructed by the city, and the filling that was done by the Sectional Dock Company and the Iron Mountain Railroad, there has been created about 1,000 feet of land *more* than there was at the time of the Brazeau confirmation, and the whole of the land shown on the plat at printed record, p. 38, including First street, 106

feet wide, the whole of blocks 867 and 868, 304 feet in width, and the whole of what is described on that plat as the wharf, 300 feet in width, has been by the city, or others under its permission and authority, brought into existence. The whole of block 868 has been sold by the plaintiff and her sister to the Iron Mountain Railroad, and this suit is to recover that portion marked "wharf" on said plat, at p. 38 of the printed record. From 1858, by lease, from time to time, the Sectional Dock Company, under the city, has been in possession of the property in controversy, and now holds the same under a lease that will expire in 1899. This possession, beginning in 1858, was begun during the lifetime of plaintiff's father, Honore Picotte, who did not die until 1860.

14. By deed in partition between the plaintiff and her sister, the north half of block 868 was conveyed to Mrs. Wilkinson, and the south half to plaintiff. (Printed Rec., p. 34.) It will be noted in this connection that the plaintiff sues for an undivided one-half interest in the whole of that portion of the wharf which lies east of block 868, and which, it is claimed, is an accretion thereto.

Thus, the property now in controversy was originally partly the bed of the slough which separated Duncan's island from the Missouri shore, and partly Duncan's island. By the acts of the city and its lessees, the slough has been filled up; a portion of the island has been washed away; the remaining portion of the island has been added to the mainland; the whole of Main street, 106 feet wide, the whole of block 868, 304 feet wide, and the whole of the wharf (the property in controversy, 300 feet wide) has been formed by the city, and since 1858,

the city, through its lessees, has been in continuous, peaceable, adverse, uninterrupted, and notorious possession thereof up to the present time, treating it as a part of its wharf.

The case was tried in the Circuit Court, upon instructions on this point to the jury as follows:

1. "The court instructs the jury that if they believe from the evidence that the defendant, St. Louis Sectional Dock Company, during the lifetime of Honore Picotte, entered upon the land sued for and actually and wholly occupied the same in their business, and from the time of said first occupation so occupied the same continuously for ten consecutive years, holding the same throughout such period openly, peaceable, exclusively, and adversely to all persons, claiming it in good faith as their own or as agents of the defendant, the City of St. Louis, then the defendants have acquired title thereto by the statute of limitations, and you will find for the defendants."

2. "The court instructs the jury that if they believe from the evidence that the possession of the city, through the Sectional Dock Company, began during the lifetime of Honore Picotte, and was open, adverse, continuous, and notorious, as described in the other instructions given, then the subsequent death of said Picotte during the minority or coverture of the plaintiff herein did not have the effect of stopping the running of the statute of limitations, and if such possession of the city continued for ten years before the institution of this suit, then their verdict must be for the defendant."

POINTS RELIED ON BY DEFENDANT IN ERROR.

1. There is no federal question involved in this case.

2. The plaintiff in error did not raise any federal question in the State courts at the proper time and in a proper manner.

3. The City of St. Louis has a perfect title, by limitation, to the premises in controversy.

BRIEF.

I.

There is no Federal Question Involved in This Case.

The possession by the city of the premises in controversy began in 1858, during the lifetime of plaintiff's father, and has been adverse, open, continuous, and notorious, claiming title against plaintiff and her ancestor ever since. This suit was begun on the 15th of January, 1892, ~~twenty~~ thirty-four years after the possession of the defendant commenced, thirty-two years after plaintiff attained her majority and four years after her coverture terminated. Neither in the Circuit Court of St. Louis, nor in the Supreme Court of Missouri (until after that court had rendered its decision) did the plaintiff in any manner undertake to raise any federal question in the case.

The defense relied on by defendant was the statute of limitations. The jury in the Circuit Court found the facts to be as defendants claimed, under instructions of that court, which unquestionably properly declared the law. The Supreme Court of Missouri followed its unbroken line of decision in holding that under the statute of limitations in Missouri the defendant had acquired a perfect title.

This Honorable Court has uniformly held that it will follow the adjudications of the Supreme Court of a State construing the State statute of limitations, and this, too, notwithstanding it did not agree with the construction of the State court.

Bauserman v. Blunt, 147 U. S. 647.

Balkam v. Woodstock Iron Co., 154 U. S. 177.

In Bauserman v. Blunt, *supra*, Mr. Justice Gray said: "By a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that 'the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Act of September 24th, 1789, chapter 20, Sec. 34; 1 Stat. at L. 92; Rev. Stat., Sec. 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real or personal, as enacted by the legislature of a State, and as construed by its highest court. Higgins v. Mein, 4 Cranch, 415, 419, 420; Shelby v. Guy, 11 Wheat. 361, 367; Bell v. Morrison, 1 Pet. 351, 360; Henderson v. Griffin, 5 Pet. 151; Green v. Neal, 6 Pet. 291, 297-300; McElmoyl v. Cohen, 13 Pet. 312, 327; Harpending v. Reformed Dutch Church, 16 Pet. 455, 493; Leffingwell v. Warren, 2 Black, 599; Sohn v. Waterson, 17 Wall, 596, 600; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 157; Kibbe v. Ditto, 93 U. S. 674; Davie v. Briggs, 97 U. S. 628, 637; Amy v. Dubuque, 98 U. S. 470; Mills v. Scott, 99 U. S. 25, 28; Moores v. Citizens' Nat. Bank of Piqua, 104 U. S. 625; Michigan Insurance Bank v. Eldred, 130 U. S. 693, 696; Penfield v. Chesapeake, O. & S. W. R. Co., 134 U. S. 351; Barney v. Oelrichs, 138 U. S. 529.

"In Patten v. Easton, 1 Wheat. 476, 482, and again in Powell v. Harman, 2 Pet. 241, this court had construed a Tenneseee statute of limitations of real actions in accordance with decisions of the

Supreme Court of the State, made since the first of those actions were certified up to this court, and supposed to have settled the construction of the statute, yet, in Green v. Neal, 6 Pet. 291, a judgment of the Circuit Court of the United States, which had held itself bound by those cases in this court, was reversed because of more recent decisions of the State court, establishing the opposite construction. * * *

"In Leffingwell v. Warren, 2 Black, 599, 603, Mr. Justice Swayne, speaking for the court, laid down, and supported by references to earlier decisions, the following propositions: 'The courts of the United States, in the absence of legislation upon the subject by Congress, recognizes the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Acts of 1789. The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judical tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' * * *

"In Amy v. Dubuque, 98 U. S. 470, 471, Mr. Justice Harlan, summing up the result of the previous decisions in the very words of some of them, said that, 'it is not to be questioned that laws limiting the time of bringing suit, constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important of sovereign rights,' and that it is as little

to be questioned that 'the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals.'

"Upon the question, how far a saving clause as to married women in a statute of limitations is affected by a subsequent statute of the State enlarging the rights of married women, this court, in two comparatively recent cases, has come to different conclusions by following in each case a single decision made by the highest court of the State since the case was brought to this court from the Circuit Court of the United States. Kibbe v. Ditto, 93 U. S. 674; Moores v. Citizens' Nat. Bank of Piqua, 104 U. S. 625. * * *

"The case at bar is governed by the law of Kansas, and the duty of this court to follow as a rule of decision the settled construction by the highest court of Kansas of a statute of that State, is not affected by the adoption of a different construction of a similar statute in Nebraska or in any other State. Shelby v. Guy, 11 Wheat. 361, 367; Christy v. Pridgeon, 4 Wall. 196, 203; Union Nat. Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 235."

In Balkam v. Woodstock Iron Co., 154 U. S. 177, a case involving the construction of a statute of limitations very similar to the statute of Missouri, Mr. Justice White followed and quoted the language of Mr. Justice Gray in Bauserman v. Blunt, *supra*, and added: "Nor can the case before us be saved from the operation of the rule thus stated by the contention that the Supreme Court of Alabama has misconstrued its statutes or has adopted a rule of

limitation or prescription in conflict therewith. In Leffingwell v. Warren, 2 Black, 599, 603, Mr. Justice Swayne, speaking for the court, thus laid down the rule:

" 'The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statute of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the Judicial Act of 1789. The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.'

"These views meet every point presented here, and do not in any manner conflict with Burgess v. Seligman, 107 U. S. 32; Carroll County Suprs. v. Smith, 111 U. S. 562; or Gibson v. Lyon, 115 U. S. 439. None of those cases involve the question of the conclusiveness on this court of the decisions of the courts of a State as to a statute of limitations and the bar created thereby. It may be that, if the question were before us for original consideration, we should hold that the right of the heirs to sue did not arise until after the death of the holder of the life estate, and, therefore, that the bar of the statute would only then begin to run; but we are not at liberty to pass upon that question. When the bar of the statute of prescription, under the laws and decisions of the State of Alabama, began to be

operative, has been construed by the court of last resort of that State. Necessarily, the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whether legal or equitable. Those questions were purely within the province of the Supreme Court of Alabama. In deciding them it passed upon its own statutes of limitations, or the doctrine of prescription as applied by it, and we are obliged to apply and enforce their conclusions."

The statute of limitations in Missouri is, and since prior to 1858 has been, as follows:

"Section 6764. No action for the recovery of any land, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this State, unless it appear that the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of such action."

Sec. 6747, Art. 1, Chap. 103, Rev. Stat. Mo. 1889.

This section is absolute as to all persons, but a saving clause is found in section 6767 of the Revised Statutes of Missouri, and is as follows:

"Section 6767. If any person entitled to commence any action in this article specified, or to make any entry be, *at the time such right or title shall first descend or accrue*, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or in execution upon some conviction of a

criminal offense for any time less than life, or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such action or the making of such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed: Provided, that no such action shall be commenced, had or maintained or entry made by any person laboring under the disabilities specified in this section, after twenty-four years after the cause of such action or right of entry shall have accrued."

In the case at bar, the right of action against the defendants first accrued to plaintiff's father in 1858. He was *sui juris*, and laboring under no disability whatever. He died two years after the defendant entered into possession of the premises sued for. The statute of limitations, therefore, continued to run under Section 6764, notwithstanding his death, and notwithstanding the life estate of plaintiff's mother, which lasted from 1860 to 1869, and notwithstanding plaintiff's coverture, which began in 1865, and hence as this action was not brought within ten years after the cause of action first accrued in favor of her father, the defendants acquired a perfect title and the plaintiff is barred in this proceeding.

It is not deemed necessary to refer further to adjudications of this Honorable Court, holding that it will follow the adjudications of the State Supreme Court relating to statutes of limitations of a State. It only remains, then, to show what the decisions of the Supreme Court of Missouri have

been and are, construing those statutes as applicable to this case.

The rule has always been in Missouri, without any qualifications whatever, that, "*Where a statute of limitations begins to run in the lifetime of an ancestor, it will continue to run against an heir who is a femme covert, or laboring under other statutory disability at the time of the ancestor's death. There is no tacking of disabilities under our statute. When the statute begins to run, nothing stops it.*"

Pim v. St. Louis, 122 Mo. 654 (being the adjudication of the Supreme Court of Missouri in the case now before this Honorable Court, and the latest adjudication of that Supreme Court construing the Missouri statute of limitations).

Wilkinson v. Dock Company, 102 Mo. 140 (being a suit by plaintiff's sister for property originally forming a part of that for which the plaintiff sues here for an undivided half and derived by Mrs. Wilkinson in the same manner that plaintiff derives her title, and involving the construction of the statute of limitations of Missouri, as applied to the city's possession of such property).

Smith v. Newby, 13 Mo. 159.
Williams v. Dongan, 20 Mo. 186.
Rodgers v. Brown, 61 Mo. 187.
Cunningham v. Snow, 82 Mo. 587.
Zoll v. Carnahan, 83 Mo. pp. 41-42.
Burdett v. May, 100 Mo. 19.

In construing the meaning of Section 6767, Revised Statutes of Missouri, *supra*, the Supreme Court, in the case of Burdett v. May, 100 Mo. *loc. cit.* 19, said: "*The saving clause* (of the statute of limitations) *only extends to the person on whom*

the right of action first descends, or to whom the cause of action first accrues," and the learned judge cited in support of this proposition the following authorities and cases:

"Angell on Limitations, Secs. 477-478, *et. seq.*

"Landes v. Perkins, 12 Mo. 238.

"Cunningham v. Snow, 82 Mo. 587.

"Williams v. Dongan, 20 Mo. 186.

"Swearingen v. Robertson, 39 Wis. 462.

"Bozeman v. Browning, 31 Ark. 364.

"Wood on Limitations, Sec. 251, *et seq.*, and cases."

This Honorable Court has announced the same rule.

In Bauserman v. Blunt, 147 U. S., *loc. cit.* 657, Mr. Justice Gray said: "In the absence of express statute or controlling adjudication to the contrary, two general rules are well settled: First. When the statute of limitations has once begun to run its operation is not suspended by a subsequent disability to sue. Walden v. Gratz, 1 Wheat 292; Mercer v. Selden, 1 How. 37; Harris v McGovern, 99 U. S. 161; McDonald v. Hovey, 110 U. S. 619."

It follows, therefore, that as this Honorable Court accepts as binding on it the adjudications of the State courts construing State statutes of limitations, and as the Supreme Court of Missouri has construed the statute of limitations of that State to mean that where it begins to run in the lifetime of an ancestor it continues to run against the heir who is a *femme covert* or laboring under other statutory disability at the time of the ancestor's death, and that

there is no tacking of disabilities, but that when the statute begins to run nothing stops it, and as this Honorable Court has announced the same rule of law, and as the cause of action in this case first accrued to plaintiff's ancestor during his lifetime, and two years before his death, the statute of limitations commenced to run in 1858, and did not cease to run thereafter because of the life estate in plaintiff's mother, nor because of plaintiff's coverture, and that inasmuch as the plaintiff has had her day in all of the courts in the State of Missouri having jurisdiction to hear and determine this matter, and has appeared as the plaintiff in this proceeding, and prosecuted her case through all of said courts, this Honorable Court has no jurisdiction in the matter, or, if it has jurisdiction, it will be bound by the decision of the Supreme Court of Missouri construing the effect of the Missouri statute of limitations. This the Supreme Court of Missouri has done in this identical case.

The writ of error herein should, therefore, be dismissed, or the judgment of the Supreme Court of Missouri affirmed.

II.

The plaintiff in error did not raise any federal question in the State courts at the proper time and in a proper manner.

Neither in the Circuit Court nor in the State Supreme Court did the plaintiff in error raise any constitutional question whatever, whether under the State constitution or under the Constitution of the United States. The first time any such idea was injected into this case was in a motion for re-hearing filed in the Supreme Court of Missouri after that court had rendered its decision in this case. (Printed Rec., p. 81.)

This did not raise a federal question at the proper time and in the proper way, and coming for the first time in a petition for re-hearing, it was too late.

In Sayward v. Denny, 158 U. S. 180, Mr. Chief Justice Fuller said: "As the validity of no treaty or statute of, or authority exercised under the United States, nor of a statute of, or authority exercised under any State, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed in the State court, and that the decision of the highest court of the State, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed. And in that regard certain propositions must be regarded as settled: 1. That the certificate of the presiding judge of the State court, as to the existence of grounds upon which our in-

terposition may be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. Powell v. Brunswick County Board of Suprs., 150 U. S. 433, 439, and cases cited. 2. *That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way.* Miller v. Texas, 153 U. S. 535; Morrison v. Watson, 154 U. S. 111, 115, and cases cited. 3. *That such a claim cannot be recognized as properly made when made for the first time in a petition for re-hearing after judgment.* Loeber v. Schroeder, 149 U. S. 580, 585, and cases cited. * * 6. *The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed.* Hoyt v. Thompson, 1 Black, 518; Maxwell v. Newbold, 18 How. 515."

Defendant in error, therefore, contends that no federal question was raised in or adjudicated by the State court, and that the raising of a federal question for the first time in the State Supreme Court on motion for re-hearing came too late.

Counsel for plaintiff in error, on page 11 of his argument, seems to concede this proposition, but contends that the decision in Sayward v. Denny, 158 U. S. 180, is overcome, overruled or in conflict with the decision in Huntington v. Attrill, 146 U. S. 657; Marchant v. Railroad, 153 U. S. 380; and Scott v. McNeal, 154 U. S. 34, or, at any rate, that these three cases constitute an exception to the rule laid down in the case of Sayward v. Denny, *supra.*

I confidently assert that an examination of the three cases claimed to constitute an exception to the rule laid down in Sayward v. Denny does not sup-

port the contention of counsel as applicable to this case.

Huntington v. Attrill, 146 U. S. 657, was a case where the courts in Maryland refused to enforce a judgment rendered by the courts in New York, and this Honorable Court held that, "Whether due faith and credit were denied by the court of a State to a judgment rendered in another State, is a federal question, of which this court has jurisdiction on writ of error."

Mr. Justice Gray, delivering the opinion of the court, in reversing the decision of the Maryland court, held that full faith and credit had not been given by the courts in Maryland to the judgment rendered by the courts in New York.

I am unable to see the application of this doctrine to the case at bar.

Marchant v. Railroad, 153 U. S. 380, was an action for damages to the property of the plaintiff caused by the building of a railroad on property belonging to the railroad on the opposite side of the street from plaintiff's property. The plaintiff recovered judgment in the Court of Common Pleas of Philadelphia; the Supreme Court of Pennsylvania reversed the judgment, and the plaintiff sued out a writ of error to this Honorable Court.

Mr. Justice Shiras, delivering the opinion of the court, said: "We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except the errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held

in like cases, that we have no jurisdiction to review the judgment of the State court, and we should have to dismiss the writ of error for that reason.

But we are urged to sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken 'without due process of law,' and because the plaintiff was denied 'the equal protection of the laws,' and these propositions are said to present federal questions arising under the 14th amendment of the Constitution of the United States, to which our jurisdiction extends.

It is sufficient for us to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law.' The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In these courts her rights were measured, not by laws made to affect her individually, but by general propositions of law applicable to all those in like condition.

To justify this position it is not necessary to enter into an examination of the origin, meaning and scope of the phrase 'due process of law,' as found in the 5th and 14th amendments. That has been done so often, and so thoroughly, in previous cases, that all we need to do is to cite a few of them.

Davidson v. New Orleans, 96 U. S. 97, came to this court on a writ of error to the Supreme Court of the State of Louisiana. There was State legislation under which an assessment had been laid on real estate belonging to Davidson, for draining swamp land in the parish of Orleans. Objections were raised in the State courts, including alleged departures from the requirement of the statute

under which the proceedings were had, and objections based on the claim that Davidson was, by the proceedings, deprived of his property without due process of law. This court briefly disposed of the objections based on questions of method and detail and disregard of statutory directions by saying that such questions were not regulated or controlled by the Constitution of the United States. In respect to the contention that the assessment in question deprived the plaintiff in error of his property without due process of law, the court said, after deprecating any attempt to define what it is for a State to deprive a person of life, liberty or property without process of law, in terms which would cover every exercise of power thus forbidden to the State, whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of procedure in such a case.

The party complaining here appeared and had a full and fair hearing in the court of the first in-

stance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the constitution.'

In Hagar v. Reclamation Dist., No. 108, 111 U. S. 701, 708, is found the following definition of the phrase: 'It is sufficient to observe here, that by "due process" is meant, one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question, therefore, means that there can be no proceedings against life, liberty or property which may result in a deprivation of either, without observance of those general rules established in our system of jurisprudence for the security of private rights.'

Missouri Pac. R. Co. v. Humes, 115 U. S. 520, was a case where it was contended that, by an act of the State of Missouri requiring railroad companies to erect and maintain fences, and affixing penalties for disobediance, a railroad company previously chartered was deprived of property without due process of law, and it was said: 'If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property

without due process of law.' Without incumbering this opinion with citations of the language used, we refer to the following cases: *Ex parte* Kemmler, 136 U. S. 436; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254; Hallinger v. Davis, 146 U. S. 314; Yesler v. Harbor Line Comrs., 146 U. S. 646."

I am likewise unable to discover wherein it can reasonably be claimed that this decision constitutes any exception to the general rule or creates a class within which the case at bar could be brought, which is not covered by the decision in Sayward v. Denny, *supra*.

Scott v. McNeal, 154 U. S. 34, was a case wherein the defendant claimed title to land under a deed made by an administrator appointed for plaintiff's estate on the supposition that the plaintiff was dead. After being absent many years, the plaintiff returned and found that he had been treated as dead and his estate administered upon and the land in question sold. He brought ejectment. The State court held that the adjudication of the Probate Court that plaintiff was dead was conclusive upon him, and therefore in contemplation of law he was dead, notwithstanding he was the plaintiff in the suit and present in court.

Mr. Justice Gray in delivering the opinion of this Honorable Court, reversing the decision of the Supreme Court of the State of Washington, held: that the decision of the Probate Court was not conclusive and was without due process of law, and said: "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words, 'due process of law,' when applied to

judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit: and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance .' * * *

"The defendants do not rely on any statute of limitations, nor upon any statute allowing them for improvements made in good faith; their sole reliance was upon a deed from an administrator; acting under the orders of a court which had no jurisdiction to appoint him, or confer any authority upon him, as against the plaintiff."

I am also unable to detect wherein this decision creates any class of cases constituting an exception to the general rule laid down in Sayward v. Denny.

On page 12 of the brief of plaintiff in error it is said, "It was under authority of the three cases named that the plaintiff in error sued out the writ of error herein, and it is submitted that in the light of these decisions, the jurisdiction of this court in the premises cannot be denied."

I likewise submit that this case does not present a case where full faith and credit has been denied by the courts of one State to the judgments of another State, as was the case in Huntington v. Attrill, *supra*, nor does it show that the plaintiff has been deprived of any right, title or interest in

land without due process of law as required by the Constitution of the United States, and defined in Marchand v. Railroad, *supra*, but that on the contrary she has been given all the opportunities to assert and maintain her claim, which the decision of this Honorable Court held was necessary to conclude her rights; nor does this case come within the rule laid down in Scott v. McNeal, *supra*, that a Probate Court can declare a live man dead and proceed to administer upon his estate, and when he returns and claims his own, deny him such rights because he has been legally adjudicated dead.

By no proper reading of the decisions of this Honorable Court can it be justly said that plaintiff has been deprived of any of her rights without due process of law, nor that the three cases cited and relied on by plaintiff in error constitute an exception to the rule laid down in Sayward v. Denny, within which plaintiff can bring herself and entitle herself to a decision by this court.

Counsel for plaintiff in error refers to Fulkerson v. Mitchell, 82 Mo. 13; Rust v. Goff, 94 Mo. 511; and Byrne v. France, 131 Mo. 639, as decisions of the Supreme Court of Missouri, affecting or bearing upon plaintiff's status in this case.

An examination of these cases will easily demonstrate that the case at bar is not affected by any of these decisions, nor were the questions there decided similar to the questions in the case at bar.

Fulkerson v. Mitchell, *supra*, was a case in ejectment where the party in possession set up a plea of the statute of limitations, and won the case in the lower court. Speaking of such a title, the court said:

"It is now the settled law of this State that a de-

fendant in an action of ejectment need not plead the statute of limitations. The doctrine now is, that the statute not only bars plaintiff's recovery, but also confers title upon the occupant, which he may show in the plea of the general issue."

Rust v. Goff was a suit in ejectment, and decides that "the husband is the proper and only party to be made defendant in an action for the wife's lands."

Byrne v. France, *supra*, was decided by Judge Burgess, who likewise decided the case at bar in the Supreme Court of Missouri, and simply decides that "Where a testator gives to his wife all his real estate for life, and provides that at her death it shall go to his children, or to their descendants, the children on the testator's death acquire a vested remainder in the lands."

What bearing these decisions have upon the case at bar, I have been unable to determine.

Counsel for plaintiff in error misconceives, or erroneously states, the case at bar, and seeks to apply to it decisions which have no application to the facts in this case whatever. His whole contention is that inasmuch as plaintiff's mother had a life estate from 1860 to 1869, which barred her as the owner of the remainder from bringing ejectment during that period; and inasmuch as plaintiff married in 1865, before the termination of the life estate, and as, during coverture, her husband was entitled to the possession of her property, and as her coverture continued until 1888, therefore, the statute of limitations does not bar her recovery in this case.

The vice of this contention, and the glaring error therein, consists in counsel misapplying the sav-

ing clause of section 6767, of the Revised Statutes of Missouri.

In section 6764 all persons are barred who do not commence proceedings to recover lands within ten years from the time such person, or his ancestor, was in possession of the premises. If this was the only statutory provision of the State of Missouri, it would apply to persons under disability of coverture or infancy, as well as to persons who were *sui juris*, but the legislature of Missouri saw fit to make certain exceptions to this absolute rule, and provided that if any person entitled to commence an action be, "*at the time such right or title shall first descend or accrue*," an infant, insane, imprisoned, or a married woman, then the time limited by section 6764 should not be deemed to commence until the termination of such disability.

If, therefore, the cause of action in this case first accrued to plaintiff's mother, the holder of the life estate, or to plaintiff, the owner of the remainder, when she was under disability of coverture, the position taken by counsel for plaintiff would be applicable. But such is not the case at bar. In this case the cause of action first accrued in favor of plaintiff's father in 1858, at which time the city's possession of the premises in controversy began. And under the decisions of the Supreme Court of Missouri, construing the statute of limitations of that State, the statute of limitations having begun to run during the lifetime of the ancestor, continues to run uninterruptedly, notwithstanding the subsequent life estate in the wife and the subsequent disability of the plaintiff by reason of her coverture.

III.

The City of St. Louis Has a Perfect Title by Limitation to the Premises in Controversy.

The property here in controversy belongs to the City of St. Louis just as effectually as if it had a patent from the government or a deed from the owner thereof. It may be said that courts should not look with favor upon titles acquired by limitation, but the wisdom of ages has sanctioned titles acquired in this manner. In Shepherd v. Thompson, 122 U. S. 231, this court said: "The statute of limitations is a statute of repose, and it does not rest merely on presumption of payment." The Supreme Court of Missouri, in Fulkerson v. Mitchell, 82 Mo. 13, said: "The doctrine now is that the statute not only bars plaintiff's recovery, but also confers title upon the occupant, which he may show under the plea of the general issue."

Statutes of this kind are necessary, and when enforced settle titles, and if the judgment in cases involving titles transfers the paper title of the plaintiff to the actual title of the occupant and claimant, who has held and improved the land for the statutory period, such judgments do not constitute a taking of private property without due process of law.

In this case the title of the city has become a righteous, equitable and legal one. By the action of the city, begun in 1858, during the lifetime of plaintiff's father, and continued for two years before his death, and presumably with his knowledge and consent, the city has brought into usefulness, if not into being, not only the land in controversy, but the whole of block 868, in front of which this

portion of the city's wharf lies, which block has been sold by the plaintiff and her sister, and in addition thereto the city has created the whole of Main street, 106 feet wide, besides other property which the plaintiff and her ancestors have gotten the the benefit of; in short, the city, the Sectional Dock Company, as lessee of the city, and the Iron Mountain Railroad, as the licensee of the city, have brought into use about 1,000 feet more of land on the west bank of the Mississippi river than existed in 1836, when the government of the United States confirmed the concession to Brazeau. Of these 1,000 feet the city has 106 feet for Main street and 300 feet (the property here in dispute), the remainder has enured to the benefit of plaintiff and her ancestors without the expenditure of a cent on their part, but on the contrary realizing to them many thousands of dollars. As hereinbefore shown, the property in dispute was originally a part of the bottom of the slough that separated Duncan's island from the Missouri shore and a part of what was formerly Duncan's island, and was created by the city, or at any rate filled up by the city so as to become useful, as a part of its scheme to establish a wharf along the river front of the City of St. Louis. After the city had accomplished all of this good, and thirty-four years after the city had entered into the possession of the premises, this suit was instituted. The judgment of the Missouri State courts was right, and should be affirmed.

Respectfully submitted,

Attorney for Defendant in Error.